FEDERAL RECLAMATION AND RELATED LAWS ANNOTATED

UNITED STATES DEPARTMENT OF THE INTERIOR

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FEDERAL RECLAMATION AND RELATED LAWS ANNOTATED

SUPPLEMENT I

1967-1982 SUPPLEMENT TO VOLUMES I-III
APPENDIX
INDEX

UNITED STATES DEPARTMENT OF THE INTERIOR
Donald Paul Hodel, *Secretary*

OFFICE OF THE SOLICITOR
Ralph W. Tarr, *Solicitor*

BUREAU OF RECLAMATION
C. Dale Duvall, *Commissioner*

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U.S. DEPARTMENT OF THE INTERIOR
March 3, 1849

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PREFACE

The original three volumes of "Federal Reclamation and Related Laws Annotated," published by the Department of the Interior in 1972, have proven to be an invaluable reference source for everyone interested in knowing the legal history of the Federal Reclamation program authorized by the Reclamation Act of 1902 and the related hydroelectric power marketing program that was transferred to the Department of Energy in 1977.

The publication at this time of two additional volumes, Volume IV and Supplement I, brings that legal history up to date through 1982.

The Department also is publishing as a separate volume a compilation of legal materials issued through mid-1988 that deal with the Reclamation Reform Act of 1982, as amended.

DONALD PAUL HODEL
Secretary of the Interior

FOREWORD

This Supplement I to Volumes I, II and III, together with Volume IV, published as a separate volume, brings "Federal Reclamation and Related Laws Annotated" up to date through 1982.

Volume IV contains the statutes, compacts and treaties enacted or approved from 1967 through 1982 that directly affect the program responsibilities of the Bureau of Reclamation and the Alaska, Bonneville, Southeastern, Southwestern and Western Area Power Administrations of the Department of Energy, together with other selected laws or compacts that relate to these programs. Two 1966 statutes are included that were inadvertently omitted from Volume III—the Great Salt Lake Relicted Lands Act and the National Historic Preservation Act of 1966.

Volume IV also includes annotations of court decisions and opinions of the Department of the Interior, the Department of Energy, the Comptroller General, the Attorney General, the Commissioner of Internal Revenue, the Federal Power Commission and the Federal Energy Regulatory Commission that interpret such laws and are deemed relevant to the programs and activities of the Bureau of Reclamation or the power administrations. Opinions of field attorneys are not annotated unless they have been endorsed by the Department.

Supplement I contains amendments to laws included in the first three volumes as well as annotations of agency and judicial opinions issued from 1967 through 1982 that interpret those laws. Accordingly, when reference is made in Volume IV to an act contained in Volumes I-III, Supplement I should be consulted to determine whether the statute referred to has been amended at any time between 1967 and 1982.

The cut-off date for all material is December 31, 1982; however, when an initial decision in a lawsuit entered before that date is annotated, an effort has been made to indicate subsequent decisions in that litigation. All citations to the U.S. Code are to the 1982 edition, except for the Appendix, which includes revisions to the Code through 1985.

A new Appendix is included in Supplement I. It sets forth certain administrative statutes of general application that are referred to frequently by program administrators and attorneys.

A combined Index covering all of the material in Volume IV and any new material in the Supplement not cited in the original index in Volume III is also contained in Supplement I.

The pages in Volumes I, II and III are numbered sequentially, from page 1 through 2211. The pages in Volume IV are numbered beginning with page 2301. The pages in Supplement I are numbered S1, S2, and so on.

As with the first three volumes, the basic order of appearance is chronological. Acts of Congress are shown by the date of enactment, interstate compacts by the date of the Act giving Congressional consent thereto, and Treaties by the date of signing. Provisions which are repeated in annual appropriations acts are shown under the date of first appearance.

A distinction in the treatment of acts has been made between those that deal primarily with the programs and activities of the Bureau of Reclamation and the power administrations and those that are related only secondarily to such programs and activities. The principal difference is that amendments to primary statutes are also included separately by their date of enactment, whereas amendments to secondary statutes are not separately included.

In order to hold down the size of this work within manageable limits, it has been necessary to exclude a number of categories of statutes (except to the extent included in the Appendix) and interpretative material, such as those dealing with personnel, contracting authority and the interpretation of individual contracts, budgeting and accounting, appropriations, Congressional investigations, and State law. References to administrative actions and policy determinations, as distinguished from the strictly legal construction of Federal law, have been omitted except in isolated cases.

In a work of this magnitude errors and omissions are unavoidable. Suggestions for corrections and additions are invited and should be submitted to the Solicitor, Department of the Interior, Washington, D.C. 20240.

LOUIS D. MAURO
RICHARD K. PELZ
Editors

Washington, D.C.
July 1988

Secretaries of the Interior, 1967-1988

Name	*Year Appointed*	*Name*	*Year Appointed*
Stewart L. Udall	1961	Cecil D. Andrus	1977
Walter J. Hickel	1969	James G. Watt	1981
Rogers C.B. Morton	1971	William P. Clark	1983
Stanley K. Hathaway	1975	Donald Paul Hodel	1985
Thomas S. Kleppe	1975		

Solicitors, Department of the Interior, 1967-1988

Name	*Year Appointed*	*Name*	*Year Appointed*
Frank J. Barry	1961	Leo M. Krulitz	1977
Edward Weinberg	1968	Clyde O. Martz	1980
Mitchell Melich	1969	William H. Coldiron	1981
Kent Frizzell	1973	Frank K. Richardson	1984
H. Gregory Austin	1975	Ralph W. Tarr	1985

Commissioners of Reclamation, 1967-1988

Name	*Year Appointed*	*Name*	*Year Appointed*
Floyd E. Dominy	1959	Robert N. Broadbent	1981
Ellis L. Armstrong	1969	Robert A. Olson (Acting)	1983
Gilbert G. Stamm	1973	Clifford I. Barrett (Acting)	1985
R. Keith Higginson	1977	C. Dale Duvall	1985

Secretaries of Energy, 1977-1988

Name	*Year Appointed*	*Name*	*Year Appointed*
James R. Schlesinger	1977	Donald Paul Hodel	1982
Charles W. Duncan, Jr	1979	John S. Herrington	1985
James B. Edwards	1981		

General Counsels, Department of Energy, 1977-1988

Name	*Year Appointed*	*Name*	*Year Appointed*
Lynn R. Coleman	1978	Theodore J. Garrish	1983
Eric J. Fygi (Acting)	1980	J. Michael Farrell	1985
R. Tenney Johnson	1981	Eric J. Fygi (Acting)	1987

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ARTICLE I

* * * * *

Section 8. [Powers of Congress—.]—

* * * * *

[Commerce clause.]—

* * * * *

NOTE OF OPINION

4. Federal water rights

A review of the applicable Federal constitutional, legislative and judicial authorities demonstrates that Congress, under the Property and Commerce Clauses of the Constitution, has plenary power to control the disposition and use of water appurtenant to lands owned by the United States. That power extends to water on, under, over and appurtenant to Federally-owned lands in the States. This does not preclude, however, the power of individual States to, at a minimum, promulgate and exercise non-conflicting State regulation. The legislative and case law authorities also demonstrate Congressional intent to defer control of water to the States in all but the most limited circumstances. Congress has chosen to displace State control of water appurtenant to Federal lands only when necessary to accomplish the original purpose of formal reservations. When not necessary to accomplish such original purpose, Congress has uniformly permitted and the Supreme Court has recognized State control. Therefore, there is no Federal "non-reserved" water right. Federal entities, including, without limitation, the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management, may not, without Congressionally created reserved rights, circumvent State substantive or procedural laws in appropriating water. Rather, Federal entities must acquire water as would any other private claimant within the various States. Congress' deference to State law in section 8 of the Reclamation Act of 1902 is particularly noteworthy because that Act provided for substantial Federal action and expense to develop water resources within the States. Memorandum of Solicitor Coldiron to Secretary, September 11, 1981, in re Non-Reserved Water Rights—United States Compliance with State Law.

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ARTICLE IV

* * * * *

Section 3. [Property clause.]—

* * * * *

NOTES OF OPINIONS

2. Water rights

A review of the applicable Federal constitutional, legislative and judicial authorities demonstrates that Congress, under the Property and Commerce Clauses of the Constitution, has plenary power to control the disposition and use of water appurtenant to lands owned by the United States. That power extends to water on, under, over and appurtenant to Federally-owned lands in the States. This does not preclude, however, the power of individual States to, at a minimum, promulgate and exercise non-conflicting State regulation. The legislative and case law authorities also demonstrate Congressional intent to defer control of water to the States in all but the most limited circumstances. Congress has chosen to displace State control of water appurtenant to Federal lands only when necessary to accomplish the original purpose of formal reservations. When not necessary to accomplish such original purpose, Congress has uniformly permitted and the Supreme Court has recognized State control. Therefore, there is no Federal "non-reserved" water right. Federal entities, including, without limitation, the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management, may not, without Congressionally created reserved rights, circumvent State substantive or procedural laws in appropriating water. Rather, Federal entities must acquire water as would any other private claimant within the various States. Congress' deference to State law in section 8 of the Reclamation Act of 1902 is particularly noteworthy because that Act provided for substantial Federal action and expense to develop water resources within the States. Memorandum of Solicitor Coldiron to Secretary, September 11, 1981, in re Non-reserved Water Rights—United States Compliance with State Law.

The United States may acquire non-reserved water rights by appropriating and actually using unappropriated water necessary to carry out Congressionally mandated management functions. This right may not be defeated by State law definitions of beneficial use or diversions. Solicitor Krulitz Opinion, M-36914, 86.I.D. 553, 574-78 (1979) in re federal water rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management. [Editor's Note: This opinion was rescinded by Memorandum of Solicitor Coldiron to Secretary, September 11, 1981, in re Non-reserved Water Rights—United States Compliance with State Law, to the extent it is inconsistent with the conclusions reached in the Coldiron memorandum.]

The Federal reserved water right is created by implication as well as by express language in the reservation of public land for particular purposes. It arises from Federal law, and is not dependent on State law for its existence or perfection. It does not require that water be put to actual use, and therefore is different from the concept of appropriation of water upon which Western States principally, but not exclusively, rely. It establishes a right to water to carry out the purpose(s) of the Federal reservation as of the date the reservation is created, whether the water is actually put to use and whether future appropriators under State law have actual knowledge of its existence. Solicitor Krulitz Opinion, M-36914, 86.I.D. 553, 573 (1979) in re federal water rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management. [Editor's Note: This opinion was rescinded by Memorandum of Solicitor Coldiron to Secretary, September 11, 1981, in re Non-reserved Water Rights—United States Compliance with State Law, to the extent it is inconsistent with the conclusions reached in the Coldiron memorandum.]

Under the Property Clause and the Supremacy Clause, the Congress controls the disposition and use of water on, under, flowing through or appurtenant to lands owned by the United States; and the States may not exercise any governmental authority over such waters, unless they have been expressly granted that authority by the Congress. Solicitor Krulitz Opinion, M-36914, 86 I.D. 553, 563-64 (1979), in re Federal water rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management. [Editor's Note: This opinion was rescinded by Memorandum of Solicitor Coldiron to Secretary, September 11, 1981, in re Non-reserved Water Rights—United States Compliance with State Law, to the extent it is inconsistent with the conclusions reached in the Coldiron memorandum.]

The "Winters doctrine" rights of the Fort Mojave Indian Tribe to irrigation water from the Colorado River do not provide a basis for a claim to an allocation of power generated by the river's flow. *The Fort Mojave Indian Tribe, et al. v. United States,* U.S.D.C., C.D. California, CV77-4790 ALS (July 6, 1978).

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ARTICLE VI

* * * * *

[Supremacy clause.]—

* * * * *

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  Transmission line siting permit 3
Federal water rights 6

1. Compliance with State law—Reclamation projects, generally

Section 8 of the Reclamation Act of 1902 was not intended to require any later Congress to tolerate State laws whose operation would otherwise be curtailed by the Supremacy Clause, nor to require any particular form of clear statement by a later Congress before inconsistent State laws were overridden. Section 8 requires only that State law will apply unless the contrary is intended by Congress. The Supreme Court decision in *California v. United States,* 438 U.S. 645 (1978), requires that the United States follow State water law absent a preempting Federal statute. A State statute or regulation is preempted by a Federal rule to the extent it conflicts with a Federal statute or where it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Therefore, a State limitation or condition on the Federal management or control of a federally financed water project is valid unless it clashes with express or clearly implied Congressional intent or works at cross-purposes with an important Federal interest served by the Congressional scheme. *United States v. California,* 694 F.2d 1171 (9th Cir. 1982)

2.—Sale of project power

The Supremacy Clause of Article VI of the Constitution precludes a State from interfering with the operation of Federal policies constitutionally mandated by Congress. Thus, as section 9(c) of the Reclamation Project Act of 1939 and section 9(c) of the Flood Control Act of 1944 Congressionally authorize the terms for the sale of hydroelectric power from Reclamation projects by the Secretary of the Interior, the Iowa State Commerce Commission correctly found that it lacked the power to restrain the Bureau of Reclamation from disposing of such hydroelectric power to certain Iowa municipalities even though such sales might have been in violation of Iowa law. *Iowa Public Service Co. v. Iowa State Commerce Commission,* 407 F.2d 916 (8th Cir. 1969), cert. denied, 396 U.S. 826 (1969).

3.—Transmission line siting permit

In view of the Supremacy Clause and the Supreme Court's decisions in *Hancock v. Train,* 426 U.S. 167 (1976) and *EPA v. State Water Resources Control Board,* 426 U.S. 200 (1976), a Federal power marketing agency is not required to obtain a permit from a State agency under a State siting law to construct a transmission line unless Congress clearly and unambiguously expresses its intent that the agency is to be subject to the State regulatory process, as distinguished from State environmental standards. *Columbia Basin Land Protection Association v. Schlesinger,* 643 F.2d 585, 602-606 (9th Cir. 1981), affirming *Columbia Basin Land Protection Association v. Kleppe,* 417 F. Supp. 46 (E.D. Wash. 1976). Accord, *Citizens and Landowners Against the Miles City/New Underwood Powerline v. Secretary,* 683 F.2d 1171, 1178-1182 (8th Cir. 1982), affirming 513 F. Supp. 257 (D. S.Dak. 1981).

6. Federal water rights

Under the Property Clause and the Supremacy Clause, the Congress controls the disposition and use of water on, under, flowing through or appurtenant to lands owned by the United States; and the States may not exercise any governmental authority over such waters, unless they have been expressly granted that authority by the Congress. Solicitor Krulitz Opinion, M-36914, 86 I.D. 553, 563-64 (1979), in re Federal water rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management. [Editor's Note: This Opinion was rescinded by Memorandum of Solicitor Coldiron to Secretary, September 11, 1981, in re Non-reserved Water Rights—United States Compliance with State Law, to the extent it is inconsistent with the conclusions reached in the Coldiron Memorandum.]

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FIFTH ARTICLE OF AMENDMENT

[Due process clause—Just compensation clause.]—

*   *   *   *   *

NOTES OF OPINIONS

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1. Due process—Generally

When the Secretary of the Interior notified the California-Pacific Utilities Company (Cal-Pac), a nonpreference customer, that its 1958 20-year contract to purchase power from the Parker-Davis project would be allowed to expire and would not be renewed, the Secretary was not required to notify customers of Cal-Pac who might be preference entities. They have no "property" interest in the power as against other preferred entities and therefore no due process claims. Publication of notice in the Federal Register of a proposed reallocation of Parker-Davis power that included a reallocation of the power sold to Cal-Pac was sufficient. *The Fort Mojave Indian Tribe, et al. v. United States*, U.S.D.C., C.D. California, CV77-4790ALS (1978).

The City of Santa Clara does not have a "property" interest in an "entitlement" to Central Valley Project power as against other preferred entities entitling it to constitutional due process, but it does have such an interest as against nonpreference entities such as Pacific Gas & Electric Company. *City of Santa Clara, California v. Andrus*, 572 F.2d 660, 675-77 (9th Cir. 1978), reversing *City of Santa Clara v. Kleppe*, 418 F. Supp. 1243 (N.D. Cal. 1976), cert. denied sub nom. *Pacific Gas and Electric Co. v. City of Santa Clara*, 439 U.S. 859 (1978).

2.—Excess lands

Differing conditions in different geographic areas may provide a reasonable basis for different legislative treatment. Territorial uniformity is not a constitutional prerequisite. Therefore, since the Reclamation statutes are a rational legislative response to climatic differences between the western region and the remainder of the nation and provision for acreage limitations is a reasonable means of furthering the public purposes underlying these statutes, the fact that the acreage limitations are inapplicable east of the 100 degree meridian does not deny farmers west of that meridian equal protection of the laws. In addition, since water users have no vested right to be relieved of acreage limitations by paying an allocable share of project construction costs, imposition of acreage limitations did not deprive them of a right without due process of law. *United States v. Tulare Lake Canal Co.*, 677 F.2d 713 (9th Cir. 1982), cert. granted, judgment vacated, and case remanded with directions to dismiss as moot sub nom. *Tulare Lake Canal Co. v. United States*, 459 U.S. 1095 (1983). [Editor's Note: The Supreme Court's action was based upon enactment of section 212 of the Reclamation Reform Act of 1982 (Act of October 12, 1982, 96 Stat. 1269, 43 U.S.C. §390*ll*) which, with certain exceptions, exempted lands receiving benefits from Federal water resources projects constructed by the Corps of Engineers from the provisions of Reclamation law. The 1982 Act appears in Volume IV in chronological order.]

6. Just compensation—Generally

The Tucker Act, giving exclusive jurisdiction to the Court of Claims to decide claims against the United States founded on the Constitution, Acts of Congress, agency actions, or contracts with the United States, applies only to claims for money damages. It does not preclude an action in a District Court requesting a declaratory judgment stating that a concessionaire providing public use facilities at Lake Berryessa of the Solano Project has contract rights against the United States. *Laguna Hermosa Corp. v. Martin*, 643 F.2d 1376 (9th Cir. 1981).

7.—Taking, what constitutes

Where a Fifth Amendment claim of taking of private property for a public use is founded upon interference with land due to flooding, proof of frequent and inevitably recurring inundation due to governmental action is required where the flooding is not permanent. Thus, where plaintiffs alleged that their property, adjacent to the Trinity River, has sustained flood damage as the result of the operations of the Trinity River Division during a severe storm, no taking occurred where the evidence not only failed to demonstrate that the property would be subjected to inevitably recurring overflows of water but also established that the flooding which occurred was far less than would have been the case had the Trinity River Division never been built. *Accardi v. United States*, 599 F.2d 423 (Ct. Cl. 1979).

Because the Colorado-Big Thompson Project diminished the seasonal overflow of waters of the Colorado River onto meadowland adjacent to the river, the owners of the land were entitled to compensation for the taking of their property. Their property right in the natural overflow was recognized by Colorado State law and by Senate Document No. 80, 75th Cong., 2d Sess., in which the project was described. *United States v. Northern Colorado Water Conservancy District*, 449 F.2d 1 (10th Cir. 1971); *United States v. Martin*, 267 F.2d 764 (10th Cir. 1959).

12.—Interest

No Fifth Amendment right to just compensation arises when an easement is exercised pursuant to the Canal Act of 1890. The sole right to compensation in this instance arises from the statutory authorization of section 1 of the Act of October 4, 1966. As the latter Act does not include a provision for interest, no interest may be assessed on that portion of the verdict and judgment awarded for the taking by the Bureau of Reclamation of land subject to the Canal Act in connection with the construction of the Ainsworth Canal. *United States v. 106.64 Acres of Land*, 264 F. Supp. 199 (D. Neb. 1967).

RECOGNITION OF VESTED WATER RIGHTS

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Sec. 2339, R.S. [Vested rights to use of water—Right of way for canals—Liability for injury.]—

* * * * *

EXPLANATORY NOTE

Limited Repeal. Section 706(a) of the Federal Land Policy and Management Act of 1976 (Act of October 21, 1976, Public Law 94–579, 90 Stat. 2793) repealed part of section 2339, R.S., insofar as it applies to the issuance of rights-of-way over, upon, under, and through the public lands and lands in the National Forest System. The affected part of section 2339, R.S., reads as follows: "and the right-of-way for the construction of ditches and canals for the purpose herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage." Extracts from the 1976 Act, including section 706(a), appear in Volume IV in chronological order.

PATENTS SUBJECT TO VESTED WATER RIGHTS

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Sec. 2340, R.S. [Patents, preemption, and homesteads subject to vested and accrued water rights.]—

*   *   *   *   *

EXPLANATORY NOTE

Limited Repeal. Section 706(a) of the Federal Land Policy and Management Act of 1976 (Act of October 21, 1976 Public Law 94–579, 90 Stat. 2793) repealed part of section 2340, R.S., insofar as it applies to the issuance of rights-of-way over, upon, under, and through the public lands and lands in the National Forest System. The affected part of section 2340, R.S., reads as follows: "or rights to ditches and reservoirs used in connection with such water rights,". Extracts from the 1976 Act, including section 706(a), appear in Volume IV in chronological order.

IRRIGATION SURVEYS; RESERVOIR SITES

Pages 15-16

[Reservation of reservoir sites generally.]—Sites for reservoirs and other hydraulic works necessary for the storage and utilization of water for irrigation and the prevention of floods and overflows, located or selected prior to August 30, 1890, shall remain segregated and reserved from entry, or settlement, until otherwise provided by law, and reservoir sites thereafter located or selected on public lands shall in like manner be reserved from the date of the location or selection thereof. (25 Stat. 526; Act of August 30, 1890, 26 Stat. 391; Act of October 21, 1976, 90 Stat. 2792; 43 U.S.C. § 662)

EXPLANATORY NOTES

Errors in the Text of Volume I. Volume I failed to note that the provisions of the 1888 Act, as modified by the Acts of August 30, 1890, 26 Stat. 391, and March 3, 1891, 26 Stat. 1101, were codified in 43 U.S.C. §§ 662 and 663, and that § 662 of the code contained a proviso authorizing the President to open reservoir sites to settlement under the homestead laws.

1976 Amendment. Section 704(a) of the Federal Land Policy Management Act of 1976 (Act of October 21, 1976, Public Law 94-579, 90 Stat. 2743) repealed part or all of 43 U.S.C. § 662. It is shown above as it appears in the U.S. Code. Extracts from the 1976 Act, including section 704(a), appear in Volume IV in chronological order.

RIGHTS OF WAY RESERVED TO UNITED STATES FOR CANALS AND DITCHES

Pages 17-21

[Land patents shall reserve right of way for Government canals and ditches.]—

* * * * *

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Construction with other laws 11-15
  Canal Act not repealed 11
  Just compensation, interest 12
  Relocation assistance 13

11. Construction with other laws—Canal Act not repealed

The Act of September 2, 1964, which provides that, notwithstanding the Canal Act of 1890, the Secretary of Interior shall pay just compensation to the owners of land taken for Reclamation project use for ditches or canals whose construction was begun after January 1, 1961, did not repeal the Canal Act and did not in any way affect the Government's reservation of a right-of-way as set forth in the Canal Act. *United States v. 106.64 Acres of Land,* 264 F. Supp. 199 (D. Neb. 1967).

12.—Just compensation, interest

No Fifth Amendment right to just compensation arises when an easement is exercised pursuant to the Canal Act of 1890. The sole right to compensation in this instance arises from the statutory authorization of section 1 of the Act of October 4, 1966. As the latter Act does not include a provision for interest, no interest may be assessed on that portion of the verdict and judgment awarded for the taking by the Bureau of Reclamation of land subject to the Canal Act in connection with the construction of the Ainsworth Canal. *United States. v. 106.64 Acres of Land,* 264 F. Supp. 199 (D. Neb. 1967).

13.—Relocation assistance

In acquiring rights-of-way under the Canal Act, the Bureau of Reclamation must comply with the provisions of the Uniform Relocation Assistance and Land Acquisition Policies Act of 1970 as the latter Act expressly applies to all real property acquisitions associated with Federal and Federally-assisted programs and projects. Even though the Canal Act refers only to reservations of rights-of-ways, Congress has recognized that such reservations constitute an acquisition of land by enacting the Acts of September 2, 1964 and October 4, 1966, providing for the payment of just compensation for land taken under the Canal Act for projects initiated after January 1, 1961. Memorandum of Associate Solicitor Morthland to Commissioner of Reclamation, July 15, 1971.

GRANT OF RIGHTS OF WAY FOR RESERVOIRS AND CANALS

Pages 22-24

Sec. 18. [Rights of way to canal companies and irrigation and drainage districts for reservoirs, canals, and laterals for irrigation and drainage purposes.]—

* * * * *

Sec. 19. [Map—Damages to settlers.]—

* * * * *

Sec. 20 [Application to existing and future canals—Forfeiture of rights not completed in five years after location.]—

* * * * *

Sec. 21. [Use for canal or ditch only.]—

* * * * *

EXPLANATORY NOTE

Limited Repeals. Section 706(a) of the Federal Land Policy and Management Act of 1976 (Act of October 21, 1976, Public Law 94–579, 90 Stat. 2793) repealed sections 18, 19, 20 and 21 of this Act insofar as they apply to the issuance of rights-of-way over, upon, under, and through the public lands and lands in the National Forest System. Extracts from the 1976 Act, including section 706(a), appear in Volume IV in chronological order.

CAREY ACT

Pages 25-26

Sec. 4. [Grant of desert land to States for State-supported reclamation projects.]—

* * * * *

Before the application of any State is allowed or any contract or agreement executed or any segregation of any of the land from the public domain is ordered by the Secretary of the Interior, the State shall file a map of the said land proposed to be irrigated which shall exhibit a plan showing the mode of the contemplated irrigation and which plan shall be sufficient to thoroughly irrigate and reclaim said land and prepare it to raise ordinary agricultural crops and shall also show the source of the water to be used for irrigation and reclamation.

* * * * *

(28 Stat. 422; Act of October 21, 1976, 90 Stat. 2792; 43 U.S.C. § 641)

EXPLANATORY NOTE

1976 Amendment. Section 704(a) of the Federal Land Policy and Management Act of 1976 (Act of October 21, 1976, Public Law 94–579, 90 Stat. 2793) amended section 4 of the Carey Act by deleting "and the Secretary of the Interior may make necessary regulations for the reservation of the lands applied for by the States to date from the date of the filing of the map and plan of irrigation, but such reservation shall be of no force whatever if such map and plan of irrigation shall not be approved." following "irrigation and reclamation," in the second paragraph. Extracts from the 1976 Act, including section 704(a), appear in Volume IV in chronological order.

STRUCTURES ON NAVIGABLE WATERS

Page 27

Sec. 9. [Consent of Congress required for bridges, dams, etc. on navigable waters—State legislature may authorize such structures on wholly intrastate navigable waters—Approval by Secretary of Transportation or Chief of Engineers required—Exemption.]—It shall not be lawful to construct or commence the construction of any bridge, causeway, dam, or dike over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for (1) the bridge or causeway shall have been submitted to and approved by the Secretary of Transportation, or (2) the dam or dike shall have been submitted to and approved by the Chief of Engineers and Secretary of the Army. However, such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Secretary of Transportation or by the Chief of Engineers and Secretary of the Army before construction is commenced. When plans for any bridge or other structure have been approved by the Secretary of Transportation or by the Chief of Engineers and Secretary of the Army, it shall not be lawful to deviate from such plans either before or after completion of the structure unless modification of said plans has previously been submitted to and received the approval of the Secretary of Transportation or the Chief of Engineers and the Secretary of the Army. The approval required by this section of the location and plans or any modification of plans of any bridge or causeway does not apply to any bridge or causeway over waters that are not subject to the ebb and flow of the tide and that are not used and are not susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce. (30 Stat. 1151; Act of October 15, 1982, 96 Stat. 1582; Act of January 12, 1983, 96 Stat. 2440; 33 U.S.C. § 401)

EXPLANATORY NOTES

1983 Amendment. Section 2(f) of the Act of January 12, 1983 (Public Law 97-449, 96 Stat. 2440) amended section 9 to reflect the transfer of certain functions, powers, and duties of the Secretary of the Army thereunder to the Secretary of Transportation. The 1983 Act does not appear herein.

1982 Amendment. Section 107(b) of the Act of October 15, 1982 (Public Law 97-322, 96 Stat. 1582) amended section 9 by adding the exemption provision contained in the last sentence. The 1982 Act does not appear herein.

Popular Name. The Act of March 3, 1899 (30 Stat. 1121) is sometimes called the River and Harbor Act of 1899.

Pages 27-28

Sec. 10. [Other structures obstructing navigation—Approval of Chief of Engineers required.]—

* * * * *

NOTES OF OPINIONS

1. **Reclamation projects**
2. **Private right of action**

1. Reclamation projects

By pumping water from the Sacramento-San Joaquin Delta to the Delta-Mendota Canal, the Tracy Pumping Plant, Central Valley Project, alters or modifies the condition or capacity of a navigable stream and its operations must, therefore, be presumed to constitute an obstruction to navigable capacity and subject to the requirements of section 10 of the Act of March 3, 1899. But while not an obstruction expressly authorized by Congress, the plant is nonetheless exempt from section 10's requirement that it obtain a permit for its operations, as the basic legislative enactments authorizing the Central Valley Project in 1937, as well as the annual appropriations acts for the operation and maintenance of the project, when read in the light of the history of the broad oversight exercised by Congress over the project, constitute affirmative Congressional authorization for the pumping operations of the Tracy Plant. *Sierra Club v. Andrus*, 610 F.2d 581 (9th Cir. 1979), reversed on other grounds, *California v. Sierra Club*, 451 U.S. 287 (1981), judgment vacated and case remanded, *Sierra Club v. Watt*, 451 U.S. 965 (1981).

With regard to the construction by the Bureau of Reclamation of seven earthfill dikes which lie partially below the mean high water line of the Yellowstone River in Montana, the legislation and the history of the Act of March 3, 1905 (33 Stat. 1045) demonstrate that Congress intended to exempt the Bureau from obtaining a permit from the Corps of Engineers, which would otherwise be required by the Act of March 3, 1899 (30 Stat. 1121). Letter from Associate Solicitor Garner to Mr. J. Lankhorst, May 6, 1975.

2. Private right of action

No private right of action is created by the River and Harbors Appropriation Act of 1899. The statute does not unmistakably focus on any particular class of beneficiaries whose welfare Congress intended to further. Rather, the legislative history of the Act indicates that it was designed to benefit the public at large by empowering the Federal Government to exercise its authority over interstate commerce with respect to obstructions on navigable rivers caused by bridges and similar structures. Congress was concerned not with private rights but with the Federal Government's ability to respond to obstructions on navigable waterways. *California v. Sierra Club*, 451 U.S. 287 (1981), reversing *Sierra Club v. Andrus*, 610 F.2d 581 (9th Cir. 1979).

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Sec. 13. [Deposit of refuse in navigable waters generally.]—It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit, or cause, suffer, or procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed: *Provided,* That nothing herein contained shall extend to, apply to, or prohibit the operations in connection with the improvement of navigable waters or construction of public works, considered necessary and proper by the United States officers supervising such improvement or public work: *And provided further,* That the Secretary of the Army, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any material above mentioned in navigable waters, within limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such material; and whenever any permit is so granted the conditions thereof shall be strictly complied with, and any violation thereof shall be unlawful. (30 Stat. 1152; 33 U.S.C. § 407)

EXPLANATORY NOTES

Editor's Note, Omission. Section 13 of the Act of March 3, 1899 was inadvertently omitted from Volume I.

Popular Name. Section 13 of the Act of March 3, 1899 is sometimes referred to as the Refuse Act of 1899.

Economic Impacts. The report of the conferees on the Agricultural-Environmental and Consumer Protection Programs Appropriations Act, Fiscal Year 1972 (H.R. 9270) stated in part:

> "The conferees believe it most important that the various agencies of Government and the Congress, in the review and appraisal of Federal Government programs, projects, and activities, have full information available not only as to the impact upon the environment but also the significant economic impact on the public and the affected areas and industries.
>
> "The conferees, therefore, direct that, in addition to the environmental effects of an action, all required reports from departments, agencies, or persons shall also include information, as prepared by the agency having responsibility for administration of the program, project, or activity involved, on the effect on the economy, including employment, unemployment, and, other economic impacts.
>
> "The conferees expect the agencies involved to spend such additional sums as may be necessary, out of general funds available, to cover any additional costs of preparing such statements.
>
> "This requirement will apply primarily to the environmental impact statements required under section 102 of the Environmental Quality Act, and the reports required under the permit dumping programs based on the Refuse Act of 1899." (H.R. Rept. No. 92-376, 95th Cong., 1st Sess. 7-8 (1971).

NOTE OF OPINION

1. All-American Canal, desilting operations

The Bureau of Reclamation is not required to obtain a discharge permit from the Corps of Engineers under section 13 of the Rivers and Harbors Act of 1899 concerning the sediment discharges from the desilting basins of the All-American Canal at Imperial Dam to the California Sluiceway Channel. In support of this conclusion are the facts that 1) the desilting operations are clearly authorized by section 1 of the Boulder Canyon Project Act, 2) the proviso in section 13 states that the prohibition against discharges does not apply to operations in connection with improvements of navigable waters or to the construction of public works considered necessary and proper by officials supervising such improvements or public works, 3) the desilting operations do not discharge or deposit refuse matter but merely re-rout sediment which is already part of the river, and 4) the desilting operations are part of the Secretary's overall river operations to carry out statutory responsibilities and to assist in meeting international treaty obligations to Mexico. Memorandum of Regional Solicitor Meade to Regional Director, Boulder City, May 5, 1972.

ADDENDUM

Notes of Opinion

1. Permits under Clean Water Act

As provided in section 313(a) of the Federal Water Pollution Control Act, as amended (Clean Water Act) (33 U.S.C. § 1323), the Bureau of Reclamation is subject to the requirements in the Act to the same extent as any other person. Solicitor Krulitz Opinion, M-36915, 86 I.D. 400 (1979). [Editor's note: 33 U.S.C. § 1323 appears in Volume IV at pages 2714–2715.]

Activities of the Bureau of Reclamation "affirmatively authorized by Congress," which are excepted from section 10 of the River and Harbor Act of 1899, are *not* excepted from the requirement of section 404 of the Federal Water Pollution Control Act, as amended (Clean Water Act) (33 U.S.C. § 1344) for a permit for the discharge of dredged or fill material into the navigable waters. Solicitor Krulitz Opinion, M-36915. 86 I.D. 400 (1979). [Editor's note: 33 U.S.C. § 1344 appears in Volume IV at pages 2726-2734.]

The Bureau of Reclamation must obtain a permit under section 404 of the Federal Water Pollution Control Act, as amended (Clean Water Act) (33 U.S.C. § 1344) for the addition to waters of the United States of (1) non-toxic spoil material that is excavated or dredged from such waters or (2) any non-toxic material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody, including any structure which requires rock, sand, dirt or other material for its construction, unless the addition of such material is (3) part of the construction of a Federal project specifically authorized by Congress and has been identified in an environmental impact statement submitted to Congress prior to authorization of the project or appropriation of funds for such construction of the project (section 404(r)) or (4) for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures (404(f)(1)). Solicitor Krulitz Opinion, M-36915, 86 I.D. 400 (1979). [Editor's note: 33 U.S.C. § 1344 appears in Volume IV at pages 2726-2734.]

PERMITS FOR POWER, TELEGRAPH AND WATER FACILITIES

Pages 29-30

[Use of rights of way permitted for power, telegraph, and water facilities—Fifty feet on each side—No interest in land conferred.]—

* * * * *

EXPLANATORY NOTE

Limited Repeal. Section 706(a) of the Federal Land Policy and Management Act of 1976 (Act of October 21, 1976, Public Law 94–579, 90 Stat. 2793) repealed this Act insofar as it applies to the issuance of rights-of-way over, upon, under, and through the public lands and lands in the National Forest System. Extracts from the 1976 Act, including section 706(a), appear in Volume IV in chronological order.

THE RECLAMATION ACT

Pages 31-35

[Sec. 1. Reclamation fund established from public land receipts except 5 percent for educational and other purposes.]—

* * * * *

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- **Colorado River Basin Salinity Control Act 23**
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- **Small Reclamation Projects Act (P.L. 84-984) 22**

16. Expenditures authorized — Generally

Although the reclamation fund has received advances from the general fund of the Treasury, it remains separate and distinct from the general fund. As a general rule, if a project is authorized under Reclamation law, or is supplementary to Reclamation law, the reclamation fund is available to finance the costs thereof, absent evidence of Congressional intent to the contrary. Memorandum of Associate Solicitor Good to Commissioner, September 8, 1982.

20.—Colorado River Storage Project and Colorado River Basin Project

The specific references to the general fund of the Treasury in section 5 of the Colorado River Storage Project Act (43 U.S.C. §620d) and section 403 of the Colorado River Basin Project Act (43 U.S.C. §1543) show clearly that Congress intended the Upper Colorado River Basin Fund and the Lower Colorado River Basin Development Fund to be financed from the general fund and therefore preclude transfer of funds in the reclamation fund to the Basin Fund or the Development Fund. However, with regard to section 8 of the Colorado River Storage Project Act (43 U.S.C. §620g), since (1) the Project is a Reclamation project governed by Reclamation law, (2) construction of the recreation and fish and wildlife facilities thereunder is an authorized project purpose, (3) section 5(a) specifically provides that the Basin Fund shall not be used to carry out the provisions of section 8, and (4) the reclamation fund is money "in the Treasury not otherwise appropriated" within the meaning of section 12 (43 U.S.C. §620*k*), the reclamation fund is available for appropriation to carry out the purposes of section 8. Memorandum of Associate Solicitor Good to Commissioner, September 8, 1982.

21.—Distribution System Loans Act (P.L. 84-130)

The language and legislative history of the Distribution System Loans Act show that the reclamation fund is available for loans made under that Act. The statute indicates that loans are to be made from funds which have been specifically appropriated for the construction of irrigation distribution systems authorized to be constructed under the Reclamation laws (43 U.S.C. §§421a and b). To the extent these funds are appropriated from the reclamation fund, it is self-evident that they are available for the construction of irrigation distribution systems authorized to be constructed under Reclamation law, and for loans to irrigation districts and public agencies under the Act. Memorandum of Associate Solicitor Good to Commissioner, September 8, 1982.

22.—Small Reclamation Projects Act (P.L. 84-984)

It is clear that the Small Reclamation Projects Act is a phase of the reclamation program, is supplementary to Reclamation law, and that the reclamation fund is thus available for carrying out the purposes of that Act. Memorandum of Associate Solicitor Good to Commissioner, September 8, 1982.

23.—Colorado River Basin Salinity Control Act

With regard to Title I of the Colorado River Basin Salinity Control Act, all salinity control measures which are designated nonreimbursable as a national obligation must be financed from the general fund of the Treasury. However, since the measures authorized under sections 101(f) and 101(h) (acceleration of cooperative program and assistance in installation of system improvements to improve irrigation efficiency on the Wellton-Mohawk Irrigation and Drainage District) and section 102 (construction of new or lining of existing Coachella Canal) are not national obligations, but rather benefit the water users of ongoing Reclamation projects, the reclamation fund is available to finance these measures. With regard to Title II, since Congress designated 75% of the measures authorized thereunder as a national obligation, to be financed from the general fund of the Treasury, and the remaining 25% of Title II costs are funded from the Lower Colorado River Basin Development Fund and the Upper Colorado River Basin Fund, which in turn are financed from the general fund, no portion of Title II costs may be financed from the reclamation fund. Memorandum of Associate Solicitor Good to Commissioner, September 8, 1982.

Pages 35-37

Sec. 2. [Authority to study, locate and construct irrigation works.]—

* * * * *

2. Examinations authorized — Research

The Secretary of the Interior's authority to conduct research and development activity relating to the Reclamation program is implied in the legislation authorizing his program activities and has been expressly recognized by the Congress in subsection 0 of the Fact Finders' Act, 43 U.S.C. 377, which provides that the cost and expense of general investigations authorized by the Secretary shall be nonreimbursable. Memorandum of Associate Solicitor Hogan, April 14, 1967, in re authority to undertake research and development in high-voltage underground transmission.

Pages 37-50

Sec. 3. [Homestead entries on irrigable lands — Determination whether project is practicable—Restoration of nonirrigable lands to entry—Commutation provisions not applicable.]—All lands entered and entries made under the homestead laws within areas so withdrawn during such withdrawal shall be subject to all the provisions, limitations, charges, terms, and conditions of this act; said surveys shall be prosecuted diligently to completion, and upon the completion thereof, and of the necessary maps, plans, and estimates of costs, the Secretary of the Interior shall determine whether or not said project is practicable and advisable, and if determined to be impracticable or inadvisable he shall thereupon restore said lands to entry; public lands which it is proposed to irrigate by means of any contemplated works shall be subject to entry only under the provisions of the homestead laws in tracts of not less than forty nor more than one hundred and sixty acres, and shall be subject to the limitations, charges, terms, and conditions herein provided: *Provided,* That the commutation provisions of the homestead laws shall not apply to entries made under this act. (32 Stat. 388; Act of October 21, 1976, 90 Stat. 2792; 43 U.S.C. §§ 416, 432, 434).

EXPLANATORY NOTE

1976 Amendment. Section 704(a) of the Federal Land Policy and Management Act of 1976 (Act of October 21, 1976, 90 Stat. 2793) amended Section 3 of the Reclamation Act by repealing the part thereof preceding the first proviso, which authorized the withdrawal of lands required for irrigation works or susceptible of irrigation from said works. Extracts from the 1976 Act, including section 704(a), appear in Volume IV in chronological order.

NOTE OF OPINION

3. Withdrawals, generally—First and second form withdrawals

Notwithstanding Associate Solicitor Fisher's Opinion, M-36433 (April 12, 1957), which suggests that the Bureau of Reclamation has abandoned the distinction between first and second form withdrawals under section 3 of the Reclamation Act, nothing in either the language or history of section 5 of the Act of April 25, 1910, the Act of April 23, 1932 or section 10 of the Reclamation Project Act of 1939 evidences a Congressional intention to close to mineral location withdrawn lands which are merely susceptible of irrigation (second form withdrawals) as opposed to withdrawn lands required for irrigation works (first form withdrawals). *M. G. Johnson*, IBLA 70-14, 78 I.D. 107 (April 5, 1971).

Pages 62-69

Sec. 5. [Reclamation requirements for entrymen—No water for more than 160 acres of private lands in one ownership—Residence of landowner—Receipts to reclamation fund.]—

* * * * *

EXPLANATORY NOTES

Supplementary Provision: Changes in Acreage Limitations, Pricing and Contracts. The Reclamation Reform Act of 1982 (Title II, Act of October 12, 1982, Public Law 97-293, 96 Stat. 1261, 1263, 43 U.S.C. §§390aa et seq.) makes major changes in the acreage limitations on, the pricing of, and the contracts for the delivery of irrigation water from Reclamation projects. The 1982 Act appears in Volume IV in chronological order.

Residency Not Required. Section 211 of the Reclamation Reform Act of 1982 (Act of October 12, 1982, Public Law 97-293, 96 Stat. 1269, 43 U.S.C. §390kk) removed the residency requirement of section 5 as a prerequisite for delivery of water made available from Reclamation projects by providing that: "Notwithstanding any other provision of law, irrigation water made available from the operation of reclamation project facilities shall not be withheld from delivery to any project lands for the reason that the owners, lessees, or operators do not live on or near them." See also 43 CFR §426.14. The 1982 Act appears in Volume IV in chronological order.

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11. Excess land laws—Generally

[Editor's Note: History of Imperial Valley Acreage Limitation Controversy. In a February 24, 1933 letter Secretary Wilbur ruled that the 160-acre limitation did not apply to lands in the Imperial Valley served by the All-American Canal because they had pre-existing water rights to Colorado River water. In 1964 Solicitor Barry overruled this position. 71 I.D. 496 (1964). In 1967 the Justice Department brought suit to enforce the 160-acre limitation but lost in the district court. *United States v. Imperial Irrigation District*, 322 F. Supp. 11 (S.D. Cal. 1971). Although the Justice Department did not appeal this decision, a group of Imperial Valley residents led by Dr. Ben Yellen of Brawley, California, filed a protective notice of appeal and sought leave to intervene. The district court denied permission to intervene, but a panel of the court of appeals reversed the district court, allowed intervention, and validated the protective notice of appeal. See order of August 6, 1973 reprinted at 559 F. 2d 543. Subsequently, the appeals court reversed the district court on the merits and held that the 160-acre limit applies to Imperial Valley lands. *United States v. Imperial Irrigation District,* 559 F. 2d 509 (9th Cir. 1977); modified, 595 F. 2d 524 (9th Cir. 1979), and reaffirmed on rehearing, 595 F. 2d 525 (9th Cir. 1979). The following year the Supreme Court reversed the court of appeals, holding that the 160-acre limit did not apply to the 424,145 acres of land in the Imperial Valley that had "present perfected rights" to irrigation water in 1929. *Bryant v. Yellen,* 447 U.S. 352 (1980).

Related litigation was filed by the Yellen group in 1969 to compel the Interior Department to enforce the residency requirement of section 5 of the Reclamation Act against Imperial Valley lands receiving water through the All-American Canal. The district court first ruled in the plaintiffs' favor on a motion for partial summary judgment, *Yellen v. Hickel,* 335 F. Supp. 200 (S.D. Cal. 1971), and affirmed this ruling following a trial on the merits. *Yellen v. Hickel,* 352 F. Supp. 1300 (S.D. Cal. 1972). The appeal from this decision was consolidated with the appeal from the acreage limitation decision. The court of appeals vacated the residency decision on the grounds that the plaintiffs lacked standing to sue. *United States v. Imperial Irrigation District,* 559 F. 2d 509, 516-20 (9th Cir. 1977).]

Section 46 of the Omnibus Adjustment Act establishes restrictions on the use of water available only because of the construction of the facilities financed by the Government. Congress had the power to authorize such projects and to impose reasonable conditions, such as the acreage limitation, relevant to the Federal interest in the project and to the overall objectives thereof. *United States v. Tulare Lake Canal Co.,* 677 F.2d 713 (9th Cir. 1982), cert. granted, judgment vacated, and case remanded, with directions to dismiss as moot sub nom. *Tulare Lake Canal Co. v. United States,* 459 U.S. 1095 (1983). [Editor's Note: The Supreme Court's action was based upon enactment of section 212 of the Reclamation Reform Act of 1982 (Act of October 12, 1982, 96 Stat. 1269, 43 U.S.C. §390*ll*) which, with certain exceptions, exempted lands receiving benefits from Federal water resources projects constructed by the Corps of Engineers from the provisions of Reclamation law. The 1982 Act appears in Volume IV in chronological order.]

The perfected water right to Colorado River water decreed pursuant to section 6 of the Boulder Canyon Project Act to the Imperial Irrigation District in *Arizona v. California,* 439 U.S. 419 (1979), for the irrigation of 424,145 acres of land and related uses, may be exercised by it without regard to the land limitation provisions of §46 of the Omnibus Adjustment Act of 1926. *Bryant v. Yellen,* 447 U.S. 352, 368-78 (1980), reversing *United States v. Imperial Irrigation District,* 559 F. 2d 509 (9th Cir. 1977), and Solicitor Barry Opinion, 71 I.D. 496 (1964). [See Editor's Note above following "Excess land laws—Generally."]

If the holdings of any one landholder on all Reclamation projects exceed 160 acres, the landowner shall be deemed to be an excess landholder. Given its purpose and legislative history, there can be no doubt that section 5 of the Reclamation Act of 1902, which forbids the sale of the right to use water for land in private ownership for a tract exceeding 160 acres, imposes a limitation determined by holdings located on all projects. While the Bureau of Reclamation permitted landowners to receive Reclamation water for up to 160 acres in each of the various Reclamation projects after the enactment of the Omnibus Adjustment Act of 1926, Congress never approved this practice. Congress has always intended that landholdings of any one landowner in excess of 160 acres be deemed excess holdings, no matter in which districts or projects they are located. Solicitor Krulitz Opinion, M-36919 (December 6, 1979).

The excess land laws would apply to all project water delivered to privately owned lands located within an irrigation district. The only exception from this requirement is that the excess land law would not apply to a preexisting entitlement to water pursuant to a state water right entitlement. Memoradum of Solicitor Krulitz to Assistant Secretary, Land & Water Resources, September 21, 1977, in re Dolores Project Repayment Contract.

There is no reason why project water may not be delivered to lands held under a custodianship established in accordance with Washington State law pertaining to gifts of realty to minors. Ch. 21.25, Revised Code of Washington. Washington law makes the gift irrevocable and conveys to the minor indefeasibly vested legal title to the real property interest given. Any attempt by the donor to retain an interest to the gift property would be contrary to the Washington State Act. Memorandum of Associate Solicitor Morthland to Field Solicitor, Ephrata, Washington, July 27, 1970, in re statutory custodians holding farm units for minors.

Private irrigation diversions (those undertaken or financed independently of Federal Reclamation law) from main stem Corps of Engineers reservoirs on the Missouri River and the Columbia River System are subject to Federal Reclamation law, including the "excess lands" provisions of section 5 of the Reclamation Act of 1902 and section 46 of the Omnibus Adjustment Act of 1926 and the water service contract requirements of section 9(c) of the Reclamation Project Act of 1939, unless (1) the private diverter's water supply does not depend on the existence or operation of Federal project facilities at any time during the irrigation season; and (2) the diversion does not interfere with the authorized purposes of the Federal project. Letter of April 27, 1970 from the Secretary to the Governors of ten States.

12.—Constitutionality

Since water users have no vested right to be relieved of acreage limitations by paying an allocable share of project construction costs, imposition of acreage limitations did not deprive them of a right without due process of law. *United States v. Tulare Lake Canal Co.*, 677 F.2d 713 (9th Cir. 1982), cert. granted, judgment vacated, and case remanded with directions to dismiss as moot sub. nom. *Tulare Lake Canal Co. v. United States*, 459 U.S. 1095 (1983). [Editor's Note: The Supreme Court's action was based upon enactment of section 212 of the Reclamation Reform Act of 1982 (Act of October 12, 1982, 96 Stat. 1269, 43 U.S.C. §390*ll*) which, with certain exceptions, exempted lands receiving benefits from Federal water resources projects constructed by the Corps of Engineers from the provisions of Reclamation law. The 1982 Act appears in Volume IV in chronological order.]

Differing conditions in different geographic areas may provide a reasonable basis for different legislative treatment. Territorial uniformity is not a constitutional prerequisite. Therefore, since the Reclamation statutes are a rational legislative response to climatic differences between the western region and the remainder of the nation and provision for acreage limitations is a reasonable means of furthering the public purposes underlying these statutes, the fact that the acreage limitations are inapplicable east of the 100 degree meridian does not deny farmers west of that meridian equal protection of the laws. *United States v. Tulare Lake Canal Co.*, 677 F.2d 713 (9th Cir. 1982), cert. granted, judgment vacated, and case remanded with directions to dismiss as moot sub. nom. *Tulare Lake Canal Co. v. United States*, 459 U.S. 1095 (1983). [Editor's Note: The Supreme Court's action was based upon enactment of section 212 of the Reclamation Reform Act of 1982 (Act of October 12, 1982, 96 Stat. 1269, 43 U.S.C. § 390*ll*) which, with certain exceptions, exempted lands receiving benefits from Federal water resources projects constructed by the Corps of Engineers from the provisions of Reclamation law. The 1982 Act appears in Volume IV in chronological order.]

13.—Construction with other laws

The ownership limitations of Reclamation law, as enunicated in Solicitor's Opinion M-36919 (December 6, 1979), holding that residency remains a requirement of Reclamation law and the acreage limitation provisions apply on a reclamation-wide basis, do not apply to lands receiving water from facilities constructed pursuant to the Small Reclamation Projects Act. While the Small Reclamation Projects Act is a supplement to Reclamation law, it has been held in Sol. Op. M-36904, 85 I.D. 254 (1978), that the residency requirement was not incorporated into the Small Reclamation Projects Act. Similarly, and for the same reason, the reclamation-wide ownership limitation of Reclamation law was not incorporated into the Small Reclamation Projects Act. Memorandum of Assistant Solicitor Mauro to Regional Solicitor, Pacific Southwest, April 24, 1981, in re application of Solicitor Opinion M-36919 to Small Reclamation Projects Act Projects.

Supreme Court decisions holding that, in view of section 8 of the Reclamation Act of 1902, a State may impose conditions on the appropriation and distribution of water in a Federal Reclamation project which are not inconsistent with Congressional directives respecting the project, *California v. United States*, 438 U.S. 645 (1978), and that rights to water from the Colorado River that had been acquired in accordance with State laws and exercised by actual diversion and application of a specific quantity of water to a defined area of land before the effective date of the Boulder Canyon Project Act were not subject to the 160-acre limitation, *Bryant v. Yellen*, 447 U.S. 352 (1980), did not alter the conclusion that Congress intended by section 8 of the Flood Control Act of 1944 to make the acreage limitatons of Reclamation law, including those imposed by section 46 of the

Omnibus Adjustment Act, apply to private lands receiving irrigation benefits from the Pine Flat Project. Although section 8 of the 1902 Act is applicable generally to the Pine Flat Project, the issue resolved in *California* was not the same as the issue involving the Pine Flat Project; the Court in *California* expressly reaffirmed an earlier holding that despite section 8 of the 1902 Act, the acreage limitations in section 5 of that Act preempt contrary State law and there is no reason why the acreage limitation in section 46 of the Omnibus Adjustment Act should have a different effect; and there is no exception in the Flood Control Act of 1944, applicable to the Pine Flat Project, equivalent to section 6 of the Boulder Canyon Project Act which the Court in *Bryant* read as exempting "present perfected rights" from the acreage limitations. *United States v. Tulare Lake Canal Co.*, 677 F.2d 713 (9th Cir. 1982), cert. granted, judgment vacated, and case remanded with directions to dismiss as moot sub. nom. *Tulare Lake Canal Co. v. United States,* 459 U.S. 1095 (1983). [Editor's Note: The Supreme Court's action was based upon enactment of section 212 of the Reclamation Reform Act of 1982 (Act of October 12, 1982, 96 Stat. 1269, 43 U.S.C. §390*ll*) which, with certain exceptions, exempted lands receiving benefits from Federal water resources projects constructed by the Corps of Engineers from the provisions of Reclamation law. The 1982 Act appears in Volume IV in chronological order.]

18.—Delivery of water

Where the construction of a Federal Reclamation Project will party flood out facilities being used to supply water to private lands served by an irrigation district, the use of Federal project works to continue service to these lands does not subject them to the excess land law. Memorandum of Solicitor to Assistant Secretary-Land and Water Resources, September 13, 1977, in re Dolores Project, Project Repayment Contract.

34. Ownership of excess lands—Corporations

All lands in excess of 160 acres acquired by a parent corporation and assigned to wholly-owned subsidiaries which lacked the incidents of ownership, including dominion, control, or the power to alienate their interests therein, would be deemed excess holdings. Title held by the subsidiaries exceed 160 irrigable acres in one ownership. Memorandum of Associate Solicitor Morthland to Field Solicitor, Ephrata, Washington, March 31, 1970, in re Northern Pacific Railway Company-Acquisition of Farm Units in the Columbia Basin Project.

A corporation may not receive water to irrigate more than 160 acres. If a corporation is established for the purpose of receiving more water than permitted by the excess land provisions of Reclamation law, it shall be denied the right to receive any water. The creation of subsidiary corporations does not increase the acreage for which the corporation may receive water service. The existence of a family-held corporation shall be disregarded in determining whether landholdings of individual shareholders, including their beneficial interest in corporate property, exceed the 160-acre limit. Acting Solicitor Weinberg Opinions, M-36729, M-36730, and M-36731, 75 I.D. 115, 119, and 122 (April 22, 1968).

35.—Federal Government

The construction given section 5 of the Reclamation Act of 1902 forbidding the sale of a right to use water for land in non-Federal ownership for tracts in excess of 160 acres did not bar the Fish and Wildlife Service from permitting Klamath project water to be supplied to lands in excess of 160 acres by private farmers in the Lower Klamath National Wildlife Refuge under a cooperative farming program conducted by the Service. Memorandum of Regional Solicitor, Portland, to Regional Director, Fish and Wildlife Service, Portland, December 28, 1977, in re Bureau of Reclamation 160-acre Limitation, concurred in by Associate Solicitor, Energy & Resources, on January 10, 1978.

41. Residency of landowner—Generally

The residency requirement of section 5 of the Reclamation Act is made applicable, by section 14 of the Boulder Canyon Project Act, to deliveries of Boulder Canyon Project water to lands in the Imperial Valley. This requirement continues in perpetuity until Congress changes the Reclamation law by appropriate statutory enactment. *Yellen v. Hickel*, 352 F. Supp. 1300 (S.D. Cal. 1972), vacated for lack of standing to sue, *United States v. Imperial Irrigation District*, 559 F.2d 509, 516-20 (1977). [Editor's Note: Section 211 of the Reclamation Reform Act of 1982 (Act of October 12, 1982, 96 Stat. 1269, 43 U.S.C. § 390kk) removed residency as a prerequisite for delivery of irrigation water made available from the operation of Reclamation projects. The 1982

Act appears in Volume IV in chronological order. See also 43 CFR § 426.14.]

Residency upon the land remains a condition of the receipt of Federally subsidized irrigation water derived from Reclamation projects. Section 46 of the Omnibus Adjustment Act of 1926 substituted the system whereby irrigation districts supplied water to individual irrigators for the sale of water rights directly to landowners. Section 46 was not, however, intended by Congress to impliedly repeal the residency requirement of section 5 of the Reclamation Act of 1902, forbidding the sale of water rights "to any landowner unless he be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land." Effect should be given to both section 5 of the 1902 Act and section 46 of the 1926 Act, as there is no repugnancy between them. The 1915 and 1916 administrative decisions interpreting the Act of August 9, 1912 to mean that residency was only a condition of the application for the delivery of water and that this requirement ceased when final water right certificates were issued, are erroneous and are overruled. Solicitor Krulitz Opinion, M-36919 (December 6, 1979). [Editor's Note: Section 211 of the Reclamation Reform Act of 1982 (Act of October 12, 1982, Public Law 97-293, 96 Stat. 1269, 43 U.S.C. § 390kk.) removed residency as a prerequisite for delivery of irrigation water made available from the operation of Reclamation projects. The 1982 Act appears in Volume IV in chronological order. See also 43 CFR § 426.14.]

42.—Standing to sue

Residents of the Imperial Valley lack standing to challenge the failure of the Department of the Interior to enforce the residency requirements of Reclamation law because their alleged injury—the inability to purchase farming land at prices they can afford to pay—is not particularized, does not flow "concretely and demonstrably" from the challenged lack of action, and would not be redressed by any appropriate relief. *United States v. Imperial Irrigation District*, 559 F.2d 509, 516-20 (9th Cir, 1977), vacating *Yellen v. Hickel*, 352 F. Supp. 1300 (S.D. Cal. 1972).

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Sec. 6. [Reclamation fund to be used for operation and maintenance—Management of works to pass to landowners—Title.]—

* * * * *

NOTE OF OPINION

12. Title to property—lands taken by reservoir enlargement

Although the water users have a unique right under the Act of April 4, 1910 (36 Stat. 269) to the current revenues from the watershed lands of Strawberry Reservoir, the better interpretation of the reference in the last sentence of the 1910 Act to "the terms of [section 6 of] the reclamation act" is that title to these lands would remain in the Government until otherwise provided by Congress. But regardless of any interests conferred on them by statute, the water users, as a result of contracts entered into with the United States in 1928 and particularly in 1940, conveyed or relinquished to the United States and were divested of any property interest, legal or equitable, that would entitle them to recover for a taking of 22,000 acres by enlargement of the Strawberry Reservoir caused by the construction of the Soldiers Creek Dam and a taking of 20 acres for the purpose of continuing certain fishery activities with the State of Utah. *Strawberry Water Users Association v. United States*, 611 F.2d 838 (Ct. Cl. 1979), cert. denied, 447 U.S. 935 (1980).

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Sec. 7. [Authority to acquire property—Attorney General to institute condemnation proceedings.]—

* * * * *

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13. Property or interest involved—Indian lands

With regard to the right-of-way purchased by the United States across the tribal lands of the Blackfoot reservation for the St. Mary's irrigation canal, Milk River reclamation project, Montana, the United States holds only that portion of the interest in the right-of-way land which is not needed for canal purposes, including the reversionary interest, for the Indians (or their successors) whose lands are crossed by the right-of-way. That the United States holds only a limited interest in the right-of-way land is evidenced by the fact that the allottees were held not to be entitled to acquire additional acreage equal to, or commensurate with, that taken for the canal right-of-way crossing their allotments, as they would have been entitled to do had their entire interest been taken. Assistant Solicitor Soller Opinion, M-36728 (April 8, 1968).

16.—Water rights

The Reclamation Act of 1902 does not confer authority to acquire additional water for a Reclamation project by extinguishing Federal water rights reserved for other purposes, particularly by extinguishing Indian property rights such as the Pyramid Lake Paiute Tribe's rights to water from the Truckee River to serve the Pyramid Lake fishery. *United States v. Truckee-Carson Irrigation District*, 649 F.2d 1286, 1298 (9th Cir. 1981); amended, 666 F.2d 351 (1982); modified in other respects, *Nevada v. United States*, 463 U.S. 110 (1983).

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Sec. 8. [Irrigation laws of States and Territories not affected—Interstate streams—Water rights.]—

* * * * *

EXPLANATORY NOTE

Supplementary Provision: Distribution System Loans Act Amendment. Section 7 of the Distribution System Loans Act, which was added by the Act of October 13, 1972 (Public Law 92-487, 86 Stat. 804), provides: "Nothing in this Act shall be construed to repeal or limit the procedural and substantive requirements of section 8 of the Act of June 17, 1902 (32 Stat. 388)." Section 7 appears in Supplement I under "July 4, 1955—Distribution System Loans Act—Pages 1218-1220" and in Volume IV in chronological order.

NOTES OF OPINIONS

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1. State laws—Generally

Notwithstanding previous dictum to the contrary, section 8 of the Reclamation Act authorizes a State to impose conditions on the control, appropriation, use or distribution of water through a Federal reclamation project so long as such conditions are not inconsistent with Congressional directives regarding the project. The legislative history of the Reclamation Act of 1902 makes it abundantly clear that Congress intended to defer to the substance, as well as the form of State water law. Consequently, in order to impound unappropriated water by means of the New Melones Dam, Central Valley Project, and later use such water for reclamation, the United States must, in accordance with State law, first apply to the California State Water Resources Control Board for a permit and must comply with such conditions as the Board may impose so long as they are not inconsistent with Congressional directives. *California v. United States*, 438 U.S. 645 (1978), reversing *United States v. California*, 558 F.2d 1347 (9th Cir. 1977), which had affirmed in part 403 F. Supp. 874 (E.D. Cal. 1975).

Once the Federal government has made binding contracts for delivery of water from the New Melones project, California would be more restricted than it was when it originally regulated impoundment and distribution of water. The Supreme Court, in *California v. United States*, 438 U.S. 645 (1978), did not mention State control over the actual operation of the dam, as contrasted with impoundment and distribution of water, as one of the purposes intended by Congress under section 8 of the Reclamation Act of 1902. State law, where not inconsistent with Federal law, was to control only the impoundment of water into the dam and the distribution of water from the dam to individual landowners. It is doubtful that the Court intended California to play a significant role in influencing the later operation of the dam. *United States v. California*, 694 F.2d 1171 (9th Cir. 1982).

Supreme Court decisions holding that, in view of section 8 of the Reclamation Act of 1902, a State may impose conditions on the appropriation and distribution of water in a Federal Reclamation project which are not inconsistent with Congressional directives respecting the project, *California v. United States*, 438 U.S. 645 (1978), and that rights to water from the Colorado River that had been acquired in accordance with State laws and exercised by actual diversion and application of a specific quantity of water to a defined area of land before the effective date of the Boulder Canyon Project Act were not subject to the 160-acre limitation, *Bryant v. Yellen*, 447 U.S. 352 (1980), did not alter the conclusion that Congress intended by section 8 of the Flood Control Act of 1944 to make the acreage limitations of Reclamation law, including those imposed by section 46 of the Omnibus Adjustment Act, apply to private lands receiving irrigation benefits from the Pine Flat Project. Although section 8 of the 1902 Act is applicable generally to the Pine Flat Project, the issue resolved in *California* was not the same as the issue involving the Pine Flat Project; the Court in *California* expressly reaffirmed an earlier holding that despite section 8 of the 1902 Act, the acreage limitations in section 5 of that Act preempt contrary State law and there is no reason why the acreage limitation in section 46 of the Omnibus Adjustment Act should have a different effect; and there is no exception in the Flood Control Act of 1944, applicable to the Pine Flat Project, equivalent to section 6 of the Boulder Canyon Project Act which the Court in *Bryant* read as exempting "present perfected rights" from the acreage limitations. *United States v. Tulare Lake Canal Co.*, 677 F.2d 713 (9th Cir. 1982), cert. granted, judgment vacated, and case remanded with directions to dismiss as moot sub. nom. *Tulare Lake Canal Co. v. United States*, 459 U.S. 1095 (1983). [Editor's Note: The Supreme Court's action was based upon enactment of section 212 of the Reclamation Reform Act of 1982 (Act of October 12, 1982, 96 Stat. 1269, 43 U.S.C. § 390*ll*) which, with certain exceptions, exempted lands receiving benefits from Federal water resources projects constructed by the Corps of Engineers from the provisions of Reclamation law. The 1982 Act appears in Volume IV in chronological order.]

As Congress has authorized the construction of the Auburn Dam and the Folsom South Canal in Section 1 of the Act of September 2, 1965, Federal preemption precludes a challenge to a contract for the sale of water from the Auburn-Folsom South Unit, Central Valley Project, to the East Bay Municipal Utility District on the grounds that the construction of the Unit is contrary to State law. Section 8 of the Reclamation Act makes State water appropriation law applicable only when not inconsistent with Congressional directives. *Environmental Defense Fund, Inc. v. East Bay Municipal Utility District*, 161 Cal. Rptr. 466, 605 P.2d 1 (1980).

Section 4 of the Act of September 2, 1965, which provides that the Secretary design the works and facilities of the Auburn-Folsom South Unit, Central Valley Project, giving due consideration to the California Water Plan and consulting with local interests through public hearings, is not a Congressional directive which makes State law inapplicable to the "control appropriation, use, or distribution of water". Thus, as section 8 of the Reclamation Act permits a State to impose on United States' water appropriation permits any condition not inconsistent with Congressional directive, there is no Federal preemption bar to plaintiff's challenge, based on State law, to the diversion point of water sold from the Unit to the East Bay Municipal Utility District. *Environmental Defense Fund, Inc. v. East Bay Municipal Utility District*, 161

Cal. Rptr. 466, 605 P.2d 1 (1980).

7.—Conditions imposed by water right permit

In light of the Supreme Court's ruling that under section 8 of the Reclamation Act of 1902 any conditions imposed by the State of California as part of the water right permit issued for the New Melones project are valid as long as the condition actually imposed is not inconsistent with Congressional directives as to the project, *California v. United States*, 438 U.S. 645 (1978), and the failure or refusal of the United States on remand to present any evidence of impracticality or harmful consequences from any specific condition, nothing is found in those conditions that could not be in harmony with the letter and spirit of the 1962 statute authorizing the project. Thus the "hard-line" position of the United States, that inasmuch as it built the dam it need not justify its operational plans so long as those plans are consistent with the scope of the project as envisioned by Congress, is rejected and the United States is not entitled at this time and on that record to have any of the conditions invalidated. *United States v. California*, 694 F.2d 1171 (9th Cir. 1982), reversing in part 509 F. Supp. 867 (E.D. Cal. 1981).

Because California law requires that water be appropriated only for beneficial use, section 8 of the Reclamation Act of 1902 mandates that the "beneficial use" standard be met by uses of water in Federal reclamation projects, and the United States made no attempt on remand to demonstrate that water made available for consumptive purposes would be put to beneficial use or to argue that such a demonstration was impossible or even difficult, the condition imposed by California as part of the water right permit issued for the New Melones project providing that no impoundment of water for consumptive uses would be allowed until further showings have been made concerning firm commitments to deliver water for such uses and the benefits to be derived therefrom is not inconsistent with Congressional directives as to the project and is therefore not invalid. *United States v. California*, 694 F.2d 117 (9th Cir. 1982), affirming 509 F. Supp. 867 (E.D. Cal. 1981).

Where the facts did not demonstrate a Congressional intent to require the dam to be used immediately for power generation purposes, the United States did not demonstrate a need to impound water for power purposes only, and there was no basis for holding that full use of the project for power purposes will not be made in due course or that interim deferment of full impoundment will adversely affect project feasibility, the condition imposed by California as part of the water right permit issued for the New Melones project prohibiting additional impoundment for power purposes is not invalid. *United States v. California*, 694 F.2d 1171 (9th Cir. 1982), reversing 509 F. Supp. 867 (E.D. Cal. 1981).

Where the statute authorizing the New Melones project provided that out-of-basin diversions should be subordinate to in-basin needs and that consideration should be given to including storage for regulation of streamflow for water quality control, conditions imposed by California as part of a water right permit requiring the project to abide by the county of origin preference of State law and to serve the State's water quality goals did not work against Congressional purposes but led to results anticipated and apparently encouraged by Congress and, inasmuch as the United States did not show (or argue) that their implementation would frustrate the attainment of any Federal goal, the conditions are upheld. The fact that Congress may have intended to have such decisions made by Federal agencies, rather than State government, does not render the conditions invalid. While a State cannot require an action solely because a Federal agency, on its own initiative, could have decided to do it, in the face of section 8 of the Reclamation Act of 1902, Congress' mere direction to operate the project is not a directive permitting Federal agencies to ignore State law in the impoundment and distribution of water. *United States v. California*, 694 F.2d 1171 (9th Cir. 1982), affirming 509 F. Supp. 867 (E.D. Cal. 1981).

8.—Federal "non-reserved" water rights

A review of the applicable Federal constitutional, legislative and judicial authorities demonstrates that Congress, under the Property and Commerce Clauses of the Constitution, has plenary power to control the disposition and use of water appurtenant to lands owned by the United States. That power extends to water on, under, over and appurtenant to Federally-owned lands in the States. This does not preclude, however, the power of individual States to, at a minimum, promulgate and exercise non-conflicting State regulation. The legislative and case law authorities also demonstrate congressional intent to defer control of water to the States in all but the most limited circumstances. Congress has chosen to displace State control of water appurtenant to Federal lands only when necessary to accomplish the original purpose of formal reservations. When not necessary to accomplish such original purpose, Congress has uniformly permitted and the Supreme Court has recognized State control. Therefore, there is no Federal "non-reserved" water right. Federal entities, including, without limitation, the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management, may not, without Congressionally created reserved rights, circumvent State substantive or procedural laws in appropriating water. Rather, Federal entities must acquire water as would any other private claimant within the various States. Congress' deference to State law in section 8 of the Reclamation Act of 1902 is particularly noteworthy because that Act provided for substantial Federal action and expense to develop water resources within the States. Memorandum of Solicitor Coldiron to Secretary, September 11, 1981, in re Non-Reserved Water Rights—United States Compliance with State Law.

27. Rights of water users—Beneficial use

Because section 8 of the Reclamation Act mandates that State law generally governs the distribution and use of water after release from a Federal reclamation project and further provides that "beneficial use shall be the basis, the measure and the limit" of rights to the use of water from reclamation projects, it is clear that the Secretary of the Interior may not knowingly release water to an individual or entity for a use which is not recognized as beneficial under State law unless such use is specifically authorized by a Congressional directive. Similarly, no one is entitled to receive water for a use not recognized as beneficial under State law. Thus, Albuquerque is prohibited from running excess water it has contracted to purchase from the Heron Reservoir, San Juan-Chama Project, to the Elephant Butte Reservoir for storage as such action would result in the loss of 93% of the stored water to evaporation and therefore could not be considered a beneficial use under New Mexico law. *Jicarilla Apache Tribe v. United States,* 657 F.2d 1126 (10th Cir. 1981).

28.—Appurtenant to land

The *Orr Ditch* decree of 1944, which concluded 31 years of litigation over water rights in the Truckee River, is binding on both the Pyramid Lake Paiute Tribe of Indians and the landowners who receive irrigation water from the Newlands Project, even though both interests were represented in the litigation by the United States. The decree thus prevents the Tribe from asserting a separate right for additional water to preserve the Pyramid Lake fishery; and it prevents the Secretary of the Interior from transferring rights of the landowners to the Tribe, as these rights are appurtenant to the land. *Nevada v. United States,* 463 U.S. 110 (1983), rehearing denied, 464 U.S. 875 (1983), modifying *United States v. Truckee-Carson Irrigation District,* 649 F. 2d 1286 (9th Cir. 1981), as amended, 666 F. 2d 351 (9th Cir. 1982).

Section 8 of the Reclamation Act, which declares that irrigation water is appurtenant to the land being irrigated and states that "beneficial use shall be the basis, the measure and the limit of the right" to irrigation water, demonstrates that water appropriated under the Act is for the use of the landowners and not the Government. The Government is only a carrier or trustee for the owners. The water belongs to the State which authorizes its use. The use may be acquired but not the ownership in the corpus of the water. *Holguin v. Elephant Butte Irrigation District,* 91 N.M. 398, 575 P. 2d 88 (1977).

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Sec. 10. [Necessary and proper acts and regulations.]—

* * * * *

NOTE OF OPINION

6. Powers of Secretary—Generally

An action to quantify Federal reserved water rights in a river from which a reclamation project takes water is within the authority conferred by Section 10 of the Reclamation Act of 1902. *United States v. Truckee-Carson Irrigation District,* 649 F. 2d 1286, 1300 (9th Cir. 1981), amended, 666 F. 2d 351 (1982), modified in other respects, *Nevada v. United States,* 463 U.S. 110 (1983).

RECLAMATION OF INDIAN LANDS IN YUMA, COLORADO RIVER, AND PYRAMID LAKE INDIAN RESERVATIONS

Pages 90-91

Sec. 25. [Reclamation and disposal of irrigable lands in Yuma and Colorado River Reservations — Diversion of Colorado River — Allotment — Price per acre — Installment payments — Proceeds.]—

* * * * *

NOTE OF OPINION

2. Construction with other laws

Section 25 of the Act of April 21, 1904, does not repeal or supersede the provision of section 17 of the Act of August 15, 1894 (28 Stat. 286, 335) ratifying the agreement of December 4, 1893, by which the Yuma (now Quechan) Indians ceded any and all interests in the non-irrigable lands in the Fort Yuma Indian Reservation created by Executive Order of January 9, 1884. Solicitor Austin Opinion, 84 I.D. 1 (January 18, 1977).

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Sec. 26. [Reclamation and disposal of irrigable lands in Pyramid Lake Indian Reservation—Allotment—Price per acre—Installment payments—Proceeds.]—

* * * * *

NOTE OF OPINION

1. Water rights

Section 26 of the 1904 Appropriations Act did not authorize the Secretary of the Interior to extinguish the Pyramid Lake Paiute Tribe's water rights in the *Orr Ditch* proceedings, nor did it compel members of the Tribe to become farmers by extinguishing the Tribe's fishery. *United States v. Truckee-Carson Irrigation District*, 649 F. 2d 1286, 1299-1300 (9th Cir. 1981), amended, 666 F. 2d 351 (1982), modified in other respects, *Nevada v. United States*, 463 U.S. 110 (1983).

CHANGE LEVELS OF LITTLE KLAMATH, TULE, AND GOOSE LAKES

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[Authority to change lake levels and dispose of lands.]

* * * * *

Explanatory Note

Codification Omitted. The Act of February 9, 1905 (33 Stat. 714), authorizing changes in the levels of Little Klamath, Tule, and Goose Lakes, originally was codified at 43 U.S.C. § 601 but was omitted from the 1976 and subsequent editions of the U.S. Code as having limited applicability.

RIO GRANDE RECLAMATION PROJECT

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[Reclamation development in Texas and New Mexico authorized from proposed Engle Dam on Rio Grande.]—

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8. Suits against United States

In an action by owners of land located within the Elephant Butte Irrigation District but not served by the Rio Grande Project to validate their unauthorized appropriation of water through pumping from the Rio Grande and for damages for failure of the District to serve them, the United States, which owns the dams and irrigation works of the Rio Grande Project and which contracts with the District through the Bureau of Reclamation for the distribution of the water, is, under New Mexico's rule of procedure, an indispensable party. The landowners are asserting claims to water already appropriated to the District. The grant of water rights to them might hinder or disrupt the Rio Grande Project and Compact and interfere with the fulfillment of the Federal government's obligations to deliver water to Mexico under the Convention of May 21, 1906. *Holguin v. Elephant Butte Irrigation District,* 91 N.M. 398, 575 P.2d 88 (1977).

9. Storage and use of project water

Because Congress has used both the term "municipal" and the term "recreational" with regard to the purposes for which water from the San Juan-Chama Project may be used, and as these terms have distinct meanings, the mere fact that excess water is to be stored at the Elephant Butte Reservoir, Rio Grande Project, for recreational purposes by the City of Albuquerque does not transform a recreational use into a municipal use. Since, under the Colorado River Storage Project Act, recreation use is only incidental to municipal use, recreation, whether provided by Albuquerque or otherwise, could not justifiably constitute the only use of a large amount of San Juan-Chama water. *Jicarilla Apache Tribe v. United States,* 657 F.2d 1126 (10th Cir. 1981).

The fact that the Act of March 26, 1964 authorized permanent storage at Cochiti Reservoir (a Corps of Engineers facility) of 50,000 acre feet of San Juan-Chama Project water, plus annual additions sufficient to offset evaporation, for recreation and fish and wildlife purposes, combined with the fact that section 1401 of the Reclamation Development Act of 1974 authorizes the release of water from Heron Reservoir, San Juan-Chama Project, to provide up to 50,000 acre feet plus evaporation loss annually to Elephant Butte Reservoir, Rio Grande Project, for a recreation pool, does not demonstrate that storage at Elephant Butte is prohibited absent express Congressional authorization. Storage at Elephant Butte for purposes which are Congressionally authorized and which constitute beneficial uses under State law would not violate the provisions of the Colorado River Storage Project Act and the Act of June 13, 1962. Rather, the Act of March 26, 1964 and section 1401 of the Reclamation Development Act were passed in order to provide authorization because water was to be released without a contract as required by section 11 of the Act of June 13, 1962 and to be used solely for recreational purposes. It cannot be inferred from these statutes that water received by contract purchasers is not to be stored at Elephant Butte for municipal, industrial, or irrigation purposes. *Jicarilla Apache Tribe v. United States,* 657 F.2d 1126 (10th Cir. 1981).

It is clear from sections 1 and 8 of the Colorado River Storage Project Act and sections 1 and 8 of the Act of June 13, 1962 that the principal uses for San Juan-Chama Project water are for irrigation, municipal, industrial, and domestic purposes, and all other uses including recreation and fish and wildlife are merely incidental. Thus, storage in Elephant Butte Reservoir, Rio Grande Project, of water purchased by Albuquerque from the Heron Reservoir, San Juan-Chama Project, is prohibited where the sole purpose is for recreational use even assuming such storage would be permitted under the law of New Mexico. *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126 (10th Cir. 1981).

Nothing in section 301(b) of the Water Supply Act of 1958 suggests that a municipality such as the City of Albuquerque may place, solely for recreational purposes, the excess water it receives from the Heron Reservoir, San Juan-Chama Project, into storage in the Elephant Butte Reservoir, Rio Grande Project. Even if the statute is read to permit storage by a municipality for any purpose, the specific terms and conditions of the Colorado River Storage Project Act and the Act of June 13, 1962, which make recreational use only incidental to the primary purposes of municipal, industrial, and irrigation uses, override conflicting authority in section 301(b). *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126 (10th Cir. 1981).

Because section 8 of the Reclamation Act mandates that State law generally govern the distribution and use of water after release from a Federal reclamation project and because this same section further provides that "beneficial use shall be the basis, the measure and the limit" of rights to the use of water from reclamation projects, it is clear that the Secretary of the Interior may not knowingly release water to an individual or entity for a use which is not recognized as beneficial under State law unless such use is specifically authorized by a congressional directive. Similarly, no one is entitled to receive water for a use not recognized as beneficial under State law. Thus, Albuquerque is prohibited from running excess water it has contracted to purchase from the Heron Reservoir, San Juan-Chama Project, to the Elephant Butte Reservoir, Rio Grande Project, for storage as such action would result in the loss of 93% of the stored water to evaporation and therefore could not be considered a beneficial use under New Mexico law. *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126 (10th Cir. 1981).

DAMS ACROSS YELLOWSTONE RIVER

Page 104

[Construction of dams authorized.]—

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NOTE OF OPINION

1. Corps of Engineers permit

With regard to the construction by the Bureau of Reclamation of seven earthfill dikes which lie partially below the mean high water line of the Yellowstone River in Montana, the legislation and the history of the Act of March 3, 1905 (33 Stat. 1045) demonstrate that Congress intended to exempt the Bureau from obtaining a permit from the Corps of Engineers, which would otherwise be required by the Act of March 3, 1899 (30 Stat. 1121). Letter from Associate Solicitor Garner to Mr. J. Lankhorst, May 6, 1975.

TOWN SITES AND POWER DEVELOPMENT

Page 109

[Sec. 1. Survey and subdivision into town lots—Reservations for public purposes.]—The Secretary of the Interior may in connection with irrigation projects under the reclamation act of June 17, 1902, not exceeding one hundred and sixty acres in each case, survey and subdivide the same into town lots, with appropriate reservations for public purposes. (34 Stat. 116; Act of October 21, 1976, 90 Stat. 2792; 43 U.S.C. §561)

EXPLANATORY NOTE

1976 Amendment. Section 704(a) of the Federal Land Policy and Management Act of 1976 (Act of October 21, 1976, Public Law 94-579, 90 Stat. 2792) amended section 1 by striking the provision authorizing withdrawal from public entry of any lands needed for town-site purposes. Extracts from the 1976 Act, including section 704(a), appear in Volume IV in chronological order.

Pages 111-113

Sec. 5. [Development and lease of surplus power—Proceeds—Impairment of projects prohibited—Longer lease permitted on Rio Grande project.]—

* * * * *

NOTES OF OPINIONS

Generally 1
Lease of power privilege 4

1. Generally

The prohibition in the Reclamation Project Act of 1939 and the Act of April 16, 1906 against contracts or leases of electric power or power privileges that "impair the efficiency of the project for irrigation purposes" applies to hydraulic or mechanical efficiency, not financial equity. Thus, it does not require that irrigators buying power from a Reclamation project and using it for irrigation pumping must be charged a lower rate than customers using the power for commercial purposes. Memorandum of Assistant Solicitor Pelz, April 24, 1975, in re claim of Arvin-Edison Water Storage District to purchase power from CVP at the 2.5 mill project energy rate rather than the commercial rate.

4. Lease of power privilege

The Secretary of the Interior may, but need not, impose upon a non-Federal power development at a Reclamation facility a charge for the lease of power privileges even though the Federal Energy Regulatory Commission has exempted the development from paying reasonable annual charges under the Federal Power Act for use of the Reclamation facility. Memorandum of Associate Solicitor Good, December 15, 1981.

In the event the State of California wishes to install a power plant at Monticello Dam, a feature of the Solano Federal Reclamation Project, it would have to obtain a license from the Federal Power Commission as well as the approval of the Secretary of the Interior. Memorandum of Acting Associate Solicitor McDowell, August 19, 1976.

CONVENTION WITH MEXICO FOR THE UPPER RIO GRANDE

Pages 114-117

NOTE OF OPINION

1. Water rights litigation

In an action by owners of land located within the Elephant Butte Irrigation District but not served by the Rio Grande Project to validate their unauthorized appropriation of water through pumping from the Rio Grande and for damages for failure of the District to serve them, the United States, which owns the dams and irrigation works of the Rio Grande Project and which contracts with the District through the Bureau of Reclamation for the distribution of the water, is, under New Mexico's rule of procedure, an indispensable party. The landowners are asserting claims to water already appropriated to the District. The grant of water rights to them might hinder or disrupt the Rio Grande Project and Compact and interfere with the fulfillment of the Federal government's obligations to deliver water to Mexico under the Convention of May 21, 1906. *Holguin v. Elephant Butte Irrigation District,* 91 N.M. 398, 575 P.2d 88 (1977).

FARM UNITS, TOWN SITES, AND DESERT-LAND ENTRIES

Pages 122-123

Sec. 4. [Heyburn and Rupert, Idaho—Limitations not applicable—Disposition of larger town sites.]—In the town sites of Heyburn and Rupert, in Idaho, created and surveyed by the Government, on which town sites settlers have been allowed to establish themselves, and had actually established themselves prior to March fifth, nineteen hundred and six, in permanent buildings not easily moved, the said settlers shall be given the right to purchase the lots so built upon at an appraised valuation for cash, such appraisement to be made under rates to be prescribed by the Secretary of the Interior. Providing that the limitation on the size of town sites contained in the act of April sixteenth, nineteen hundred and six, entitled "An act providing for the withdrawal from public entry of lands needed for town site purposes in connection with irrigation projects under the reclamation act of June seventeenth, nineteen hundred and two, and for other purposes," shall not apply to the town sites named in this section; and whenever, in the opinion of the Secretary of the Interior, it shall be advisable for the public interest, he may dispose of town sites in excess of one hundred and sixty acres under the provisions of the aforesaid act, approved April sixteenth, nineteen hundred and six, and reclamation funds shall be available for the payment of all expenses incurred in executing the provisions of this act, and the aforesaid act of April sixteenth, nineteen hundred and six, and the proceeds of all sales of town sites shall be covered into the reclamation fund. (34 Stat. 520; Act of October 21, 1976, 90 Stat. 2793; 43 U.S.C. §§ 561, 568).

EXPLANATORY NOTE

1976 Amendment. Section 704(a) of the Federal Land Policy and Management Act of 1976 (Act of October 21, 1976, Public Law 94-579, 90 Stat. 2793) amended section 4 of the Act of June 27, 1906 (34 Stat. 520) by deleting after the words "for the public interest, he may" the words "withdraw and". Extracts from the 1976 Act, including section 704(a), appear in Volume IV in chronological order.

PAYMENT FOR UINTAH INDIAN LANDS, STRAWBERRY VALLEY PROJECT

Pages 137-138

[Payment to Uintah Indians from reclamation fund for lands withdrawn for Strawberry Valley project—Installments—Reimbursement.]—

NOTES OF OPINIONS

Purpose 1
Reservation status of lands 3
Title to lands 4

1. Purpose

The water users do not have a "beneficial interest" in the watershed lands of the Strawberry Valley Project in the classic law-of-trusts sense. Solicitor Melich Opinion, M-36863, 79 I.D. 513 (1972).

3. Reservation status of lands

The Act of April 4, 1910, by providing that title, management and control of lands in the former Uintah Indian Reservation shall pass to the owners of lands irrigated from the Strawberry Valley project whenever the management and operation of the irrigation works shall so pass under the terms of the Reclamation Act of 1902, compounded with the express extinguishment of the Indian's interest, is inconsistent with continuing Indian reservation status and removed such lands from the Uintah and Ouray Reservation. *Ute Indian Tribe v. Utah,* 521 F. Supp. 1072 (D. Utah 1981).

4. Title to lands

Although the water users have a unique right under the Act of April 4, 1910 to the current revenues from the watershed lands of Strawberry Reservoir, the better interpretation of the reference in the last sentence of the 1910 Act to "the terms of [Section 6 of] the reclamation act" is that title to these lands would remain in the Government until otherwise provided by Congress. But regardless of any interests conferred on them by statute, the water users, as a result of contracts entered into with the United States in 1928 and particularly in 1940, conveyed or relinquished to the United States and were divested of any property interest, legal or equitable, that would entitle them to recover for a taking of 22,000 acres by enlargement of the Strawberry Reservoir caused by the construction of the Soldiers Creek Dam and a taking of 20 acres for the purpose of continuing certain fishery activities with the State of Utah. *Strawberry Water Users Association v. United States,* 611 F.2d 838 (Ct. Cl. 1979), cert. denied, 447 U.S. 935 (1980).

Article 20 of the 1940 contract constituted a valid waiver by the Strawberry Valley Water Users Association of its right to have title to the watershed lands of the Strawberry Valley Project. Memorandum of Associate Solicitor Miron, November 14, 1968, in re Land Acquisition — Strawberry Reservoir Enlargement, Bonneville Unit, Central Utah Project. Accord: Solicitor Melich Opinion, M-36863, 79 I.D. 513 (August 8, 1972).

ADVANCES TO THE RECLAMATION FUND

Pages 152-154

Sec. 5. [No entries allowed until announcements as to units, charges and date water can be applied—Entries prior to June 25, 1910—Disposal of relinquished lands.]—

* * * * *

NOTE OF OPINION

5. Withdrawals

Notwithstanding Associate Solicitor Fisher Opinion, M-36433 (April 12, 1957), which suggests that the Bureau of Reclamation has abandoned the distinction in section 3 of the Reclamation Act of 1902 between withdrawn lands required for irrigation works (first form withdrawals) as opposed to withdrawn lands which are merely susceptible of irrigation (second form withdrawals), section 5 of the Act of June 25, 1910 did not close to mineral location land withdrawn under a second form withdrawal. Although the language of the 1910 Act is inconclusive, it is clear that section 5 was enacted to resolve difficulties caused by homestead entries and not by mineral location. Moreover, regulations permit mineral location on land which can be opened to homestead entry only after the conditions for the 1910 Act have been satisfied and it is unlikely that mineral location would be permitted after land is ready for cultivation but prohibited while the land remains rude and arid. *M. G. Johnson*, IBLA 70-14, 78 I.D. 107 (April 5, 1971).

WITHDRAWAL OF PUBLIC LANDS BY THE PRESIDENT

Page 155

[Sec. 1. Temporary withdrawals of public lands by the President for irrigation or other public purposes.]—*Repealed.*

Sec. 2. [Mining Laws applicable.]—*Repealed.*

EXPLANATORY NOTE

Sections Repealed. Section 704(a) of the Federal Land Policy and Management Act of 1976 (Act of October 21, 1976, Public Law 94-579, 90 Stat. 2793) repealed sections 1 and 2 of the Act of June 25, 1910, 36 Stat. 847. Extracts from the 1976 Act, including section 704(a), appear in Volume IV in chronological order.

RESERVATION OF LANDS IN INDIAN RESERVATIONS FOR POWER AND IRRIGATION PURPOSES

Page 157

Sec. 13. [Indian Reservations—Power, etc., sites may be reserved—Where no project authorized.]—*Repealed.*

EXPLANATORY NOTE

Section Repealed. Section 704(a) of the Federal Land Policy and Management Act of 1976 (Act of October 21, 1976, Public Law 94-579, 90 Stat. 2793) repealed section 13 of the Act of June 25, 1910, 36 Stat. 858. Extracts from the 1976 Act, including section 704(a), appear in Volume IV in chronological order.

SALE OF SURPLUS ACQUIRED LANDS

Page 163

NOTE OF OPINION

1. Construction with other laws

Since the enactment of the Federal Property Act of June 30, 1949, the provisions of the Act of February 2, 1911, are no longer available to the Bureau of Reclamation for the purpose of disposing of surplus acquired lands. However, pursuant to General Accounting Office regulations and practice, we advise the General Accounting Office that the proceeds are to be covered into the reclamation fund and credited to the project. Memorandum of Acting Solicitor Robison to Field Solicitor, Amarillo, November 8, 1972, in re disposition of miscellaneous revenues from Rio Grande Project.

WARREN ACT

Page 171

Sec. 3. [Moneys received covered into reclamation fund.]—

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NOTE OF OPINION

1. Proceeds, crediting of

Revenues from the sale or rental of surplus water under the Warren Act continue to be credited to the project or division of the project to which the construction cost has been charged, as provided by subsection J of the Fact Finders' Act, and are not diverted to the land and water conservation fund by section 2(a) of the Land and Water Conservation Fund Act even though project lands have been transferred to the administration of the Forest Service for recreation purposes pursuant to section 7(c) of the Federal Water Project Recreation Act. Revenues under subsection J from the sale or rental of surplus water, and revenues from entrance, admission and recreation user fees under section 2(a) are derived from totally different uses of different forms of property. Memorandum of Associate Solicitor Hogan to Commissioner of Reclamation, February 28, 1967.

50-YEAR EASEMENTS FOR POWER AND COMMUNICATION FACILITIES

Pages 173-174

[Department heads authorized to grant 50-year easements for rights of way for power and communication facilities—Forfeiture by nonuse.]—

* * * * *

Explanatory Note

Limited Repeal. Section 706(a) of the Federal Land Policy and Management Act of 1976 (Act of October 21, 1976, Public Law 94-579, 90 Stat. 2793) repealed this provision insofar as it applies to the issuance of rights-of-way over, upon, under, and through the public lands and lands in the National Forest System. Extracts from the 1976 Act, including section 704(a), appear in Volume IV in chronological order.

Note of Opinion

2. Conditions

Regulations promulgated by the Secretary of the Interior requiring grantees of rights-of-way for transmission lines across public lands to transmit or "wheel" Federal power over the excess capacity of the lines, are a reasonable and lawful exercise of the authority granted by 43 U.S.C. §961. *Utah Power and Light Co. v. Morton,* 504 F.2d 728 (9th Cir. 1974).

PATENTS AND WATER-RIGHT CERTIFICATES

Pages 177-178

[Sec. 1. Homesteaders under reclamation act to receive patents when conditions completed—Purchasers of water right certificates—Payment in full required.]—

* * * * *

NOTE OF OPINION

3. Residence

Residency upon the land remains a condition of the receipt of Federally subsidized irrigation water derived from Reclamation projects. Section 46 of the Omnibus Adjustment Act of 1926 substituted the system whereby irrigation districts supplied water to individual irrigators for the sale of water rights directly to landowners. Section 46 was not, however, intended by Congress to impliedly repeal the residency requirement of section 5 of the Reclamation Act of 1902, forbidding the sale of water rights "to any landowner unless he be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land." Effect should be given to both section 5 of the 1902 Act and section 46 of the 1926 Act, as there is no repugnancy between them. The 1915 and 1916 administrative decisions, interpreting the Act of August 9, 1912, to mean that residency was only a condition of the application for the delivery of water and that this requirement ceased when final water right certificates were issued, are erroneous and are overruled. Solicitor Krulitz Opinion, M-36919 (December 6, 1979). [Editor's Note: Section 211 of the Reclamation Reform Act of 1982 (Act of October 12, 1982, Public Law 97-293, 96 Stat. 1269, 43 U.S. § 390kk) removed residency as a prerequisite for delivery of irrigation water made available from the operation of reclamation projects. The 1982 Act appears in Volume IV in chronological order. See also 43 CFR § 426.14.]

Pages 179-183

Sec. 3. [Certificate for final payment—Single holdings limited—Excess acquired by descent, etc.—Forfeiture of prohibited excess.]—

* * * * *

EXPLANATORY NOTE

Supplementary Provision: Changes in Acreage Limitations, Pricing and Contracts. The Reclamation Reform Act of 1982 (Title II, Act of October 12, 1982, Public Law 97-293, 96 Stat. 1261, 1263, 43 U.S.C. §§ 390aa to 390zz-1) makes major changes in the acreage limitations on, the pricing of, and the contracts for the delivery of irrigation water from Reclamation projects. The 1982 Act appears in Volume IV in chronological order.

NOTES OF OPINIONS

Excess land laws 1-9
  Involuntary acquisition 9
  Payout, effect of 2
Ownership of excess land 10-19
  Coalescence of holdings (See Excess land laws—Involuntary acquisition)

2. Excess land laws—Payout, effect of

An administrative exemption from enforcement of the excess land laws is authorized under the provisions of former Solicitor Barry's 1961 Opinion, M-36634, 68 I.D. 372, 405 (1961) where: (1) all construction costs of projects owing under a repayment contract had been paid out; (2) a general pattern of family-sized ownership of farms had been established within an irrigation district, except for one large 3,634 acre parcel operated as a family business by a large number of family members; and (3) many landowners had contracted with the Government on the strength of an invalidated 1947 Solicitor's Opinion to prepay their construction charges and be released from the excess land laws. The removal of the acreage limitation provisions of the excess land laws is not automatic upon the full payment of construction charges, but depends upon a discretionary finding by the Secretary of the Interior that a pattern of family-sized farms had been established. After the terms of the excess land law are lifted, owners are eligible to receive project water for their former excess holdings on an unrestricted basis. Letter of Secretary Andrus to Wayne P. Cunningham, memorandum to Assistant Secretary, and option paper, August 10, 1979, re Elephant Butte Irrigation District, New Mexico.

Water must be delivered to all lands covered by water right applications, including those deemed excess, whose construction charges have been repaid, if located within an area found by the Secretary of the Interior to constitute one in which a pattern of ownership of family-sized farms has been established. Solicitor Melich Opinion, 77 I.D. 265 (December 30, 1970), in re excess land ownership, Reservation Division-Yuma Project, California (El Rancho Del Rio, Inc.), modifying Solicitor Barry Opinion, 68 I.D. 370 (1961).

9.—Involuntary acquisition

The purpose of the Act of July 11, 1956 (70 Stat. 524), which amended section 3 of the Act of August 9, 1912 and section 46 of the Act of May 25, 1926, was to allow delivery of water for five years to excess lands involuntarily acquired by foreclosure, inheritance, or devise. Under both the 1912 Act and 1926 Acts, during the five-year period from the effective date of acquisition, the mortgagee, heir, or devisee is given the opportunity to unburden itself of holdings acquired in this manner just as if they were non-excess. There is no requirement in the 1912 Act as so amended that lands acquired in the manner described ever be sold at a price approved by the Secretary. Under the 1926 Act as amended, at the end of the five-year period, the price at which the land subject to the 1926 Act is sold must be approved by the Secretary. During the first five years, under that Act, there is no requirement that the Secretary approve the price at which lands involuntarily acquired are sold. Memorandum of Deputy Solicitor Weinberg to Regional Solicitor, Sacramento, December 15, 1967, in re price approval of excess land sold by mortgagee after foreclosure.

RECLAMATION EXTENSION ACT

Pages 191-193

Sec. 5. [Operation and maintenance charges—Basis therefor—Minimum charge—Secretary may transfer care and operation of project—Reduction or increase of charges.]—

*   *   *   *   *

NOTE OF OPINION

1. **Operation and maintenance charges**

The obligation to pay annual operation and maintenance charges of the Yuma Project assessed against irrigable lands of the Reservation Division within the Fort Yuma Indian Reservation is an interest in the lands such that the United States is entitled to compensation when such lands are condemned by the State of California for highway purposes. *People of the State of California v. 25.09 Acres of Lands*, 329 F. Supp. 230 (S.D. Cal. 1971).

Pages 197-198

Sec. 12. [Owners of private lands under new projects must dispose of excess area—Lands excluded upon refusal.]—

*   *   *   *   *

EXPLANATORY NOTE

Supplementary Provision: Changes in Acreage Limitations, Pricing and Contracts. The Reclamation Reform Act of 1982 (Title II, Act of October 12, 1982, Public Law 97-293, 96 Stat. 1261, 1263, 43 U.S.C. §§ 390aa et. seq.) makes major changes in the acreage limitations on, the pricing of, and the contracts for the delivery of irrigation water from Reclamation projects. The 1982 Act appears in Volume IV in chronological order.

NOTE OF OPINION

2. **Excess land laws—Pre-existing holdings**

Section 46 of the Omnibus Adjustment Act of May 25, 1926 superseded section 12 of the Reclamation Extension Act of August 13, 1914, thus eliminating the requirement in the 1914 Act that the Secretary of the Interior must have executed recordable contracts with all excess landowners to dispose of their excess lands at Government-approved prices before construction work on a reclamation project could begin. Section 46 allows construction to proceed even though all the excess landowners have not executed recordable contracts, but prohibits the delivery of water to excess land until a recordable contract for its sale has been executed. *United Family Farmers v. Kleppe*, 552 F.2d 823 (8th Cir. 1977), affirming 418 F. Supp. 591 (D.S.D. 1976).

Pages 199-200

Sec. 16. [Expenditures after July 1, 1915, limited to specific appropriations—To be paid out of reclamation fund.]—

*   *   *   *   *

NOTE OF OPINION

1. Use of reclamation fund

Although the reclamation fund has received advances from the general fund of the Treasury, it remains separate and distinct from the general fund. As a general rule, if a project is authorized under Reclamation law, or is supplementary to Reclamation law, the reclamation fund is available to finance the costs thereof, absent evidence of Congressional intent to the contrary. Memorandum of Associate Solicitor Good to Commissioner, September 8, 1982.

RESERVATIONS FOR PARKS AND COMMUNITY CENTERS

Page 201

[Sec. 1. Lands in reclamation project reserved for country parks, public playgrounds, and community centers.]—*Repealed.*

EXPLANATORY NOTE

Section Repealed. Section 704(a) of the Federal Land Policy and Management Act of 1976 (Act of October 21, 1976, Public Law 94-579, 90 Stat. 2793) repealed section 1 of the Act of October 5, 1914, 38 Stat. 727. Extracts from the 1976 Act, including section 704(a), appear in Volume IV in chronological order.

March 3, 1915

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SUNDRY CIVIL EXPENSES APPROPRIATIONS ACT FOR 1916

Page 205

[Damage payments.]—

* * * * *

EXPLANATORY NOTE

Provision Repeated. The shortened provision for payment of damage claims was first used in the Act of September 6, 1950 (64 Stat. 687) and has been contained in each subsequent annual appropriation act through the most recent one reviewed for this publication, the Energy and Water Development Appropriation Act, 1982 (95 Stat. 1140), which was continued for fiscal year 1983 by section 101(f) of the Further Continuing Appropriations Act for Fiscal Year 1983, 96 Stat. 1906.

LASSEN VOLCANIC NATIONAL PARK

Pages 218-219

[**Sec. 1. Park created—Rights-of-way—Indemnity Selections.**]—All those certain tracts, pieces, or parcels of land lying and being situate in the State of California and within the boundaries particularly described as follows, to wit:

* * * * *

(Legal description omitted, 39 Stat. 442)

* * * * *

are hereby reserved and withdrawn from settlement, occupancy, disposal, or sale, under the laws of the United States, and said tracts are dedicated and set apart as a public park or pleasuring ground for the benefit and enjoyment of the people of the United States under the name and to be known and designated as the Lassen Volcanic National Park; and all persons who shall locate or settle upon or occupy the same, or any part thereof, except as hereinafter provided, shall be considered trespassers and be removed therefrom: *Provided,* That nothing herein contained shall affect any valid existing claim, location, or entry under the land laws of the United States or the rights of any such claimant, locator, or entryman to the full use and enjoyment of his land: *Provided further,* that no lands located within the park boundaries now held in private, municipal, or State ownership shall be affected by or subject to the provisions of this Act: *And provided further,* That no lands within the limits of said park hereby created belonging to or claimed by any railroad or other corporation now having or claiming the right of indemnity selection by virtue of any law or contract whatsoever shall be used as a basis for indemnity selection in any State or Territory whatsoever for any loss sustained by reason of the creation of said park. (39 Stat. 442; § 4, Act of January 26, 1931, 46 Stat. 1043; § 4, Act of October 19, 1972, 86 Stat. 918; 16 U.S.C. § 201)

EXPLANATORY NOTE

1972 Amendment, Section 4 of the Act of October 19, 1972 (Public Law 92-510, 86 Stat. 918) deleted the provision permitting entry upon and utilization of the park for flowage and other purposes necessary for development and maintenance of a Reclamation project. The 1972 Act does not appear herein.

PUBLIC LANDS IN IRRIGATION DISTRICTS

Pages 224-225

Sec. 6. [Public lands sold under tax lien patented to purchaser—Payment to United States of minimum price of $1.25 per acre—Qualifications and limitations—Purchaser to make complete payment within 90 days or land may be purchased by another—Conditions—Disposal of vacant entered land.]—

* * * * *

NOTE OF OPINION

2. Irrigation works

The term "irrigation works" in section 6 of the Smith Act (Act of August 11, 1916, 39 Stat. 506) refers to facilities that serve the irrigation district in general and not to structures on an individual entry. *C. Arden Gingery, Michiko Shiota (Gingery),* 78 I.D. 218 (1971).

GRAND CANYON NATIONAL PARK

Page 244

Sec. 7. [Reclamation project—Areas formerly within Lake Mead National Recreation Area.]—Whenever consistent with the primary purposes of such park, the Secretary of the Interior is authorized to permit the utilization of those areas formerly within the Lake Mead National Recreation Area immediately prior to enactment of the Grand Canyon National Park Enlargement Act, and added to the park by such Act, which may be necessary for the development and maintenance of a Government reclamation project. (40 Stat. 1178; Act of January 3, 1975, § 9(b), 88 Stat. 2091; 16 U.S.C. § 227)

EXPLANATORY NOTE

1975 Amendment. Section 9(b) of the Act of January 3, 1975 (Public Law 93-620, 88 Stat. 2091) amended section 7 by substituting the provision authorizing utilization of areas formerly within Lake Mead National Recreation Area and added to the Park by that Act for the former provision authorizing utilization of areas within the Park. Extracts from the 1975 Act, also known as the Grand Canyon National Park Enlargement Act, appear in Volume IV in chronological order.

SUNDRY CIVIL EXPENSES APPROPRIATIONS ACT FOR 1920

Pages 246-247

[Receipts from lands withdrawn under reclamation law to go into reclamation fund—Lands needed for irrigation works and affected by other withdrawal—Secretary of Interior given jurisdiction.]—

* * * * *

NOTE OF OPINION

6. Recreation proceeds

When Reclamation land has been transferred to the Forest Service for administration pursuant to section 7(c) of the Federal Water Project Recreation Act, the Act of July 19, 1919 (41 Stat. 163, 202) is superseded by section 2(a) of the Land and Water Conservation Fund Act so that all proceeds from entrance and recreation user fees or charges collected and received shall be covered into the land and water conservation fund and not allocated to the reclamation fund. Memorandum of Associate Solicitor Hogan to Commissioner of Reclamation, February 28, 1967.

MINERAL LEASING ACT

Pages 249-250

Sec. 35. [Disposition of receipts.]—All money received from sales, bonuses, royalties including interest charges collected under the Federal Oil and Gas Royalty Management Act of 1982 [30 U.S.C. 1701 et seq.], and rentals of the public lands under the provisions of this chapter and the Geothermal Steam Act of 1970 [30 U.S.C. 1001 et seq.], notwithstanding the provisions of section 20 thereof [30 U.S.C. 1019], shall be paid into the Treasury of the United States; 50 per centum thereof shall be paid by the Secretary of the Treasury as soon as practicable after March 31 and September 30 of each year to the State other than Alaska within the boundaries of which the leased lands or deposits are or were located; said moneys paid to any of such States on or after January 1, 1976, to be used by such State and its subdivision, as the legislature of the State may direct giving priority to those subdivisions of the State socially or economically impacted by development of minerals leased under this chapter, for (i) planning, (ii) construction and maintenance of public facilities, and (iii) provision of public service; and excepting those from Alaska, 40 per centum thereof shall be paid into, reserved, appropriated, as part of the reclamation fund created by the Act of Congress known as the Reclamation Act, approved June 17, 1902, and of those from Alaska as soon as practicable after March 31 and September 30 of each year, 90 per centum thereof shall be paid to the State of Alaska for disposition by the legislature thereof: *Provided*, That all moneys which may accrue to the United States under the provisions of this chapter and the Geothermal Steam Act of 1970 from lands within the naval petroleum reserves shall be deposited in the Treasury as "miscellaneous receipts", as provided by section 7433(b) of title 10. All moneys received under the provisions of this chapter and the Geothermal Steam Act of 1970 not otherwise disposed of by this section shall be credited to miscellaneous receipts. (41 Stat. 450; Act of May 27, 1947, 61 Stat. 119; Act of August 3, 1950, 64 Stat. 402; Act of July 10, 1957, 71 Stat. 282; Act of July 7, 1958, 72 Stat. 343; Act of April 21, 1976, 90 Stat. 1090; Act of September 28, 1976, 90 Stat. 1323; Act of October 21, 1976, 90 Stat. 2770; Act of January 12, 1983, 96 Stat. 2456; 30 U.S.C. § 191)

EXPLANATORY NOTE

Subsequent Amendments. Section 35 has been amended several times since 1958. The text of the section, as so amended, is set forth above as it appears in Chapter 3A, Subchapter I, § 191, of Title 30 of the U.S. Code (1982 ed.). In addition, sections 104(a) and (c) of the Act of January 12, 1983 (Public Law 97-451, 96 Stat. 2451, 2452) provided that, applicable with respect to payments received by the Secretary after Oct. 1, 1983, unless the Secretary, by rule, prescribes an earlier effective date, this section is amended by deleting "as soon as practicable after March 31 and September 30 of each year" and by adding at the end thereof "Payments to States under this section with respect to any moneys received by the

United States, shall be made not later than the last business day of the month in which such moneys are warranted by the United States Treasury to the Secretary as having been received, except for any portion of such moneys which is under challenge and placed in a suspense account pending resolution of a dispute. Such warrants shall be issued by the United States Treasury not later than 10 days after receipt of such moneys by the Treasury. Moneys placed in a suspense account which are determined to be payable to a State shall be made not later than the last business day of the month in which such dispute is resolved. Any such amount placed in a suspense account pending resolution shall bear interest until the dispute is resolved."

SALE OF WATER FOR MISCELLANEOUS PURPOSES

Pages 251-252

[Sale of water for miscellaneous purposes other than for irrigation—Contract—Delivery not to be detrimental to water service—Moneys received to be covered into the reclamation fund.]—

* * * * *

NOTES OF OPINIONS

Construction with other laws 1
Municipal and industrial water 6

1. Construction with other laws

The Miscellaneous Water Supply Act of 1920 is inapplicable to the sale of water for industrial purposes from the Yellowtail and Boysen Reservoirs of the Missouri River Basin. The projects were built as multipurpose projects under sections 1(b) and 9 of the Flood Control Act of 1944 and the Bureau was authorized by the 1944 Act and section 9(c) of the Reclamation Project Act of 1939 to enter into the subject contracts. *Environmental Defense Fund, Inc. v. Morton*, 420 F. Supp. 1037 (D. Mont. 1976), aff'd sub nom. *Environmental Defense Fund, Inc. v. Andrus*, 596 F.2d 848 (9th Cir. 1979).

The requirement of the Act of February 25, 1920 that the Secretary be a party to all contracts to supply water from any project irrigation system for purposes other than irrigation does not apply to the Small Reclamation Projects Act of 1956, notwithstanding the language in section 11 of the latter Act that it shall be a supplement to the Federal reclamation laws. Where, as here, a provision of one of the earlier enacted general reclamation and irrigation laws conflicts with the clear intention of the 1956 Act to vest contracting authority in the local organizations which construct and operate the project, the later Act must prevail. Consequently, even though the Molokai Irrigation System has been financed, in part, under the Small Reclamation Projects Act, neither contractual approval by the Secretary of Interior or any other Federal action is required by the 1920 Act for the Board of Land and Natural Resources of Hawaii to contract to provide water facilities and space within Molokai pipelines to the Kaiuakoi Corporation to carry its well water to its proposed resort complex. *Molokai Homesteaders Cooperative Association v. Morton*, 506 F.2d 572 (9th Cir. 1974).

6. Municipal and industrial water

The Act of February 25, 1920 provides authority for the Secretary to enter into a contract with the City of Yuma and the Yuma County Water Users Association to provide for the use of a portion of the capacity of the Yuma main canal to deliver municipal and industrial water to the City of Yuma, notwithstanding that the project was authorized for the single purpose of irrigation, so long as the conditions set forth in the Act are met. Memorandum of Associate Solicitor Garner to Commissioner of Reclamation, November 3, 1975.

FEDERAL POWER ACT

Pages 262-263

Sec. 1. [Federal Power Commission—Creation—Composition—Terms of office—Organization.]—*Terminated.*

* * * * *

EXPLANATORY NOTE

Reorganization and Transfer of Functions. The Federal Power Commission was terminated and its functions, personnel, property, and appropriations authorizations and allocations were transferred to the Secretary of Energy and the Federal Energy Regulatory Commission by sections 301(b), 401(a), 402(a), 701, and 703 of the Department of Energy Organization Act of 1977 (Act of August 4, 1977, Public Law 95-91, 91 Stat. 577, 582, 583, 605, and 606, 42 U.S.C. §§ 7151(b), 7171(a), 7172(a), 7291, and 7293). Extracts from the 1977 Act appear in Volume IV in chronological order.

Pages 264-266

Sec. 3. [Definitions.]—

* * * * *

(14) "Commission" and "Commissioner" means the Federal Energy Regulatory Commission, and a member thereof, respectively.

* * * * *

(17)(A) "small power production facility" means a facility which—

(i) produces electric energy solely by the use, as a primary energy source, of biomass, waste, renewable resources, geothermal resources, or any combination thereof; and

(ii) has a power production capacity which, together with any other facilities located at the same site (as determined by the Commission), is not greater than 80 megawatts;

(B) "primary energy source" means the fuel or fuels used for the generation of electric energy, except that such term does not include, as determined under rules prescribed by the Commission, in consultation with the Secretary of Energy—

(i) the minimum amounts of fuel required for ignition, startup, testing, flame stabilization, and control uses, and

(ii) the minimum amounts of fuel required to alleviate or prevent—

(I) unanticipated equipment outages, and

(II) emergencies, directly affecting the public health, safety, or welfare, which would result from electric power outages;

(C) "qualifying small power production facility" means a small power production facility—

(i) which the Commission determines, by rule, meets such requirements (including requirements respecting fuel use, fuel efficiency, and reliability) as the Commission may, by rule, prescribe; and

(ii) which is owned by a person not primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities);

(D) "qualifying small power producer" means the owner or operator of a qualifying small power production facility;

(18)(A) "cogeneration facility" means a facility which produces—

(i) electric energy, and

(ii) steam or forms of useful energy (such as heat) which are used for industrial, commercial, heating, or cooling purposes;

(B) "qualifying cogeneration facility" means a cogeneration facility which—

(i) the Commission determines, by rule, meets such requirements (including requirements respecting minimum size, fuel use, and fuel efficiency) as the Commission may, by rule, prescribe; and

(ii) is owned by a person not primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities);

(C) "qualifying cogenerator" means the owner or operator of a qualifying cogeneration facility;

(19) "Federal power marketing agency" means any agency or instrumentality of the United States (other than the Tennessee Valley Authority) which sells electric energy;

(20) "evidentiary hearings" and "evidentiary proceeding" mean a proceeding conducted as provided in sections 554, 556, and 557 of title 5, United States Code;

(21) "State regulatory authority" has the same meaning as the term "State commission", except that in the case of an electric utility with respect to which the Tennessee Valley Authority has ratemaking authority (as defined in section 3 of the Public Utility Regulatory Policies Act of 1978), such term means the Tennessee Valley Authority;

(22) "electric utility" means any person or State agency which sells electric energy; such term includes the Tennessee Valley Authority, but does not include any Federal power marketing agency. (41 Stat. 1063; § 201, Act of August 26, 1935, 49 Stat. 838; § 201, Act of November 9, 1978, 92 Stat. 3134; § 643(a)(1), Act of June 30, 1980, 94 Stat. 770; 16 U.S.C. § 796)

EXPLANATORY NOTES

1980 Amendment. Section 643(a)(1) of the Act of June 30, 1980 (Public Law 96–294, 94 Stat. 770) amended section 3 by adding to paragraph (17)(A)(i) the provision concerning applicability to geothermal resources. The 1980 Act does not appear herein.

1978 Amendment. Section 201 of the Public Utility Regulatory Policies Act (Act of November 9, 1978, Public Law 95–617, 92 Stat. 3134) amended section 3 by adding paragraphs (17) to (22). Extracts from the 1978 Act, including section 201, appear in Volume

IV in chronological order.

American Falls Dam. Section 1 of the Act of December 28, 1973 (Public Law 93-206, 87 Stat. 904), which authorized the replacement of American Falls Dam by a non-Federal contractor, provided that the replacement dam would be considered a "Government dam" as defined in section 3(10) of the Federal Power Act. The 1973 Act appears in Volume IV in chronological order.

NOTE OF OPINION

1. "Reservations"

As Water and Power Resources Service projects are clearly "Reservations" as defined by section 3(2) of the Federal Power Act, the Secretary of Interior has the authority under the plain language of section 4(e) of the Act to require that the Federal Energy Regulatory Commission include in the licenses for non-Federal power development at a reclamation project such conditions as he deems necessary for the adequate protection and utilization of the project. Memorandum of Associate Solicitor Little to Commissioner, Water and Power Resources Service, October 16, 1980.

Pages 266-269

Sec. 4. [General powers of Commission.]—

* * * * *

EXPLANATORY NOTE

1982 Amendment. Section 212 of the Act of December 21, 1982 (Public Law 97-375, 96 Stat. 1826) amended subsection (d) of section 4 by striking the last sentence thereof. Extracts from the 1982 Act, not including section 212, appear in Volume IV in chronological order.

NOTES OF OPINIONS

Access to Reclamation projects 11
Jurisdiction of Commission 12
Licenses 1-10
  Conditions 5
  Government dams 6
  Interstate power system 7
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  Anadromous Fish Act of 1965 13
  Reclamation Project Act of 1939 14

5. Licenses—Conditions

As Water and Power Resources Service projects are clearly "Reservations" as defined by section 3(2) of the Federal Power Act, the Secretary of Interior has the authority under the plain language of section 4(e) of the Act to require that the Federal Energy Regulatory Commission include in the licenses for non-Federal power development at a Reclamation project such conditions as he deems necessary for the adequate protection and utilization of the project. Memorandum of Associate Solicitor Little to Commissioner, Water and Power Resources Service, October 16, 1980.

6.—Government dams

Under sections 4(e) and 24 of the Federal Power Act the Federal Energy Regulatory Commission has the exclusive authority to authorize a licensee to enter and occupy Federal lands for the purpose of developing water projects at governmental dams. Where the licensee is to install a powerplant at a Reclamation dam, the permission of the Water and Power Resources Service is not required. *Solano Irrigation District*, 14 FERC (CCH) ¶61,089, at 61,161 (1981).

In the event the State of California wishes to install a power plant at Monticello Dam, a feature of the Solano Federal Reclamation Project, it would have to obtain a license from the Federal Power Commission as well as the approval of the Secretary of the Interior. Memorandum of Acting Associate Solicitor McDowell, August 19, 1976.

7.—Interstate power system

A Federal Power Commission license is required for the Taum Sauk pumped storage project of Union Electric Company because it utilizes the headwaters of a navigable river to generate energy for an interstate power system. The "interests of commerce" referred to in section 23(b) of the Federal Power Act are not limited to navigation. *Federal*

Power Commission v. Union Electric Company, 381 U.S. 90 (1965).

11. Access to Reclamation projects

Although section 4(f) of the Federal Power Act authorizes the Federal Energy Regulatory Commission to issue preliminary permits to enable applicants for licenses to secure data for a proposed project, the non-Federal developer must nonetheless also obtain permission from the Water and Power Resources Service to enter upon lands and facilities administered by the Service, and is subject to such reasonable terms and conditions as the Service may impose. Memorandum of Associate Solicitor Little to Commissioner, Water and Power Resources Service, August 19, 1980.

12. Jurisdiction of Commission

Where Congress has expressly authorized the Water and Power Resources Service to develop hydropower in connection with a project, the Federal Energy Regulatory Commission may not issue a license for non-federal development. Memorandum of Associate Solicitor Little to Commissioner, Water and Power Resources Service, July 28, 1980.

The licensing jurisdiction of the Federal Power Commission under the Federal Power Act is limited to water power projects and does not extend to the licensing of thermal powerplants even though they may use water from navigable rivers or "surplus water from Government dams" for cooling purposes. *Chemehuevi Tribe of Indians v. Federal Power Commission,* 420 U.S. 395 (1975), reversing 489 F.2d 1207 (D.C. Cir. 1973).

13. Relationship with other laws—Anadromous Fish Act of 1965

Section 2 of the Anadromous Fish Act of 1965 gives the Secretary of the Interior special standing to appear, to intervene, to introduce evidence and to participate fully in a license proceeding before the Federal Power Commission on the proposed High Mountain Sheep Project on the Snake River. *Udall v. Federal Power Commission,* 387 U.S. 428 (1967), reversing and remanding *Washington Public Power Supply System v. Federal Power Commission,* 358 F. 2d 840 (D.C. Cir. 1966).

14.—Reclamation Project Act of 1939

The authority granted to the Secretary by section 10 of the 1939 Reclamation Project Act to grant leases, licenses, easements and rights-of-way affecting lands acquired by the Water and Power Resources Service is not affected by the authority of the Federal Energy Regulatory Commission, under section 4(e) of the Federal Power Act, to grant licenses to non-Federal developers to construct hydropower facilities on Service-administered land. Moreover, section 4(e) specifically provides that licenses issued pursuant thereto shall be subject to such conditions as the Secretary shall deem necessary. Memorandum of Associate Solicitor Little to Commissioner, Water and Power Resources Service, August 19, 1980.

The Federal Power Act and not section 9(c) of the Reclamation Project Act of 1939 provides the authority for non-Federal hydro power development at dams operated by the Water and Power Resources Service, but the Secretary of Interior may assess a section 9(c) charge for the lease of power privileges in a manner consistent with the provisions of the Federal Power Act. Memorandum of Associate Solicitor Little to Commissioner, Water and Power Resources Service, October 16, 1980.

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Sec. 7. (b) [Recommendation for development by United States.]—

* * * * *

NOTE OF OPINION

1. Federal development

Before making a final decision on the application of the Pacific Northwest Power Company to build the High Mountain Sheep project on the Snake River a mile upstream from its confluence with the Salmon River, the Commission should allow the Secretary of the Interior to introduce evidence as to the advisability of Federal rather than nonfederal development, the effect of the project on anadromous fish, the option of building no dam at all, and other issues affecting the public interest. *Udall v. Federal Power Commission,* 387 U.S. 428 (1967), reversing and remanding *Washington Public Power Supply System v. Federal Power Commission,* 385 F.2d 840 (D.C. Cir. 1966).

Sec. 7. (c) [Recommendation concerning Federal take-over.]—Whenever, after notice and opportunity for hearing, the Commission determines that the United States should exercise its right upon or after the expiration of any license to take over any project or projects for public purposes, the Commission shall not issue a new license to the original licensee or to a new licensee but shall submit its recommendation to Congress together with such information as it may consider appropriate. (Added by Act of August 3, 1968, 82 Stat. 616)

EXPLANATORY NOTE

1968 Amendment. Section 1 of the Act of August 3, 1968 (Public Law 90-451, 82 Stat. 616) amended section 7 by adding paragraph (c). The 1968 Act does not appear herein. For legislative history of the Act, see H.R. Rept. No. 1643 and S. Rept. No. 1338 on S. 2445.

Pages 271-274

Sec. 10. [Conditions of licenses.]—

* * * * *

(d) [Amortization reserves.]—After the first twenty years of operation, out of surplus earned thereafter, if any, accumulated in excess of a specified reasonable rate of return upon the net investment of a licensee in any project or projects under license, the licensee shall establish and maintain amortization reserves, which reserves shall, in the discretion of the Commission, be held until the termination of the license or be applied from time to time in reduction of the net investment. Such specified rate of return and the proportion of such surplus earnings to be paid into and held in such reserves shall be set forth in the license. For any new license issued under section 15, the amortization reserves under this subsection shall be maintained on and after the effective date of such new license.

* * * * *

(41 Stat. 1068; § 206, Act of August 26, 1935, 49 Stat. 842; Act of September 7, 1962, 76 Stat. 447; Act of August 3, 1968, 82 Stat. 617; 16 U.S.C. § 803)

EXPLANATORY NOTE

1968 Amendment. Section 4 of the Act of August 3, 1968 (Public Law 90–451, 82 Stat. 616) amended subsection (d) of section 10 by adding the last sentence as it appears in the text. The 1968 Act does not appear herein. For legislative history of the Act, see H.R. Rept. No. 1643 and S. Rept. No. 1338 on S. 2445.

NOTES OF OPINIONS

Comprehensive plan 1
Annual charge 3

1. Comprehensive plan

Before making a final decision on the application of the Pacific Northwest Power Company to build the High Mountain Sheep project on the Snake River a mile upstream from its confluence with the Salmon River, the Commission should allow the Secretary of the Interior to introduce evidence as to the advisability of Federal rather than nonfederal development, the effect of the project on anadromous fish, the option of building no dam at all, and other issues affecting the public interest. *Udall v. Federal Power Commission*, 387 U.S. 428 (1967), reversing and remanding *Washington Public Power Supply System v. Federal Power Commission*, 358 F.2d 840 (D.C. Cir. 1966).

3. Annual charge

The Secretary of the Interior may, but need not, impose upon a non-Federal power development at a Reclamation facility a charge for the lease of power privileges even though the Federal Energy Regulatory Commission has exempted the development from paying reasonable annual charges under the Federal Power Act for use of the Reclamation facility. Memorandum of Associate Solicitor Good, December 15, 1981.

The Department of the Interior does not have the authority to impose a "power privilege charge" on a Federal Power Act licensee utilizing a Bureau of Reclamation dam; the Federal Energy Regulatory Commission has the final authority to set the annual charge for the use of the dam. *Solano Irrigation District*, 14 FERC (CCH) ¶61,089, at 61,161 (1981).

The Reclamation Project Act of 1939 establishes the framework for the rental charge to be assessed by the Secretary of Interior for the power privilege or opportunity. Thus, notwithstanding the provision of section 10(e) of the Federal Power Act authorizing the Federal Energy Regulatory Commission to "fix a reasonable annual charge" for the use of government dams or structures by licensees, the Water and Power Resources Service should establish a charge for the lease of power privileges/falling water calculated according to section 9(c) of the Reclamation Project Act and such charge should be included as a component of the reasonable annual charge specified in section 10(e), which is subject to the approval of the Secretary of Interior. Memorandum of Associate Solicitor Little to Commissioner, Water and Power Resources Service, October 16, 1980.

Pages 276-277

Sec. 14. (a) [Right of Government to take over project at expiration of license—Payment to licensee—Determination of value of project—Right of condemnation reserved to Federal, State, and local governments.]—

* * * * *

(b) [Time of applications for new licenses—Relicensing proceedings—Federal agency recommendations of take over by Government—Stay of orders for new licenses—Termination of stay—Notice to Congress.]— No earlier than five years before the expiration of any license, the Commission shall entertain applications for a new license and decide them in a relicensing proceeding pursuant to the provisions of section 15. In any relicensing proceeding before the Commission any Federal department or agency may timely recommend, pursuant to such rules as the Commission shall prescribe, that the United States exercise its right to take over any project or projects. Thereafter, the Commission, if its [sic] does not itself recommend such action pursuant to the provisions of section 7(c) of this part, shall upon motion of such department or agency stay the effective date of any order issuing a license, except an order issuing an annual license in accordance with the proviso of section 15(a), for two years after the date of issuance of such order, after which period the stay shall terminate, unless terminated earlier upon motion of the department or agency requesting the stay or by action of Congress. The Commission shall notify the Congress of any stay granted pursuant to this subsection. (41 Stat. 1071; Act of August 26, 1935, 49 Stat. 844; Act of August 3, 1968, 82 Stat. 617; 16 U.S.C. § 807)

EXPLANATORY NOTE

1968 Amendment. Section 2 of the Act of August 3, 1968 (Public Law 90–451, 82 Stat. 616) amended section 14 by inserting "(a)" immediately preceding the first sentence thereof, and by adding subsection (b). The 1968 Act does not appear herein. For legislative history of the Act, see H.R. Rept. No. 1643 and S. Rept. No. 1338 on S. 2445.

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Sec. 15. (a) [Reissuance of license to original licensee at expiration of license upon such terms as authorized or required under then existing laws and regulations—Provision for annual renewal of license until property is taken over by Government or a new license is issued.]—

* * * * *

(b) [Issuance of licenses for nonpower use—Payment and assumption of contracts by a new licensee—Termination of license—Accounting and reporting.]—In issuing any licenses under this section except an annual license, the Commission, on its own motion or upon application of any licensee, person, State, municipality, or State commission, after notice to each State commission and licensee affected, and after opportunity for hearing, whenever it finds that in conformity with a comprehensive plan for improving or developing a waterway or waterways for beneficial public uses all or part of any licensed project should no longer be used or adapted for use for power purposes, may license all or part of the project works for nonpower use. A license for nonpower use shall be issued to a new licensee only on the condition that the new licensee shall, before taking possession of the facilities encompassed thereunder, pay such amount and assume such contracts as the United States is required to do, in the manner specified in section 14 hereof. Any license for nonpower use shall be a temporary license. Whenever, in the judgment of the Commission, a State, municipality, interstate agency, or another Federal agency is authorized and willing to assume regulatory supervision of the lands and facilities included under the nonpower license and does so, the Commission shall thereupon terminate the license. Consistent with the provisions of the Act of August 15, 1953 (67 Stat. 587), every licensee for nonpower use shall keep such accounts and file such annual and other periodic or special reports concerning the removal, alteration, nonpower use, or other disposition of any project works or parts thereof covered by the nonpower use license as the Commission may by rules and regulations or order prescribe as necessary or appropriate. (41 Stat. 1072; Act of August 3, 1968, 82 Stat. 617; 16 U.S.C. § 808)

EXPLANATORY NOTES

1968 Amendment. Section 3 of the Act of August 3, 1968 (Public Law 90-451, 82 Stat. 616) amended section 15 by inserting "(a)" immediately preceeding the first sentence thereof, and by adding subsection (b). The 1968 Act does not appear herein. For legislative history of the 1968 Act, see H.R. Rept. No. 1643 and S. Rept. No. 1338 on S. 2445.

Reference in the Text. The Act of August 15, 1953, exempted projects owned by States and municipalities from the takeover provisions of section 14, the records and accounting requirements of sections 301 and 302, and the requirement of section 4(b) for a statement of the actual legitimate original cost of a project. The text of the 1953 Act appears in a note in Volume I at page 276.

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Sec. 17. [Disposition of proceeds—Reclamation fund.]—

* * * * *

NOTE OF OPINION

2. Crediting of revenues to project accounts

There is no statutory authority to credit revenues arising under section 17 of the Federal Power Act from the non-Federal use of public lands within Reclamation projects to the reimbursable construction accounts of the Reclamation project where the non-Federal use has taken place, once these funds have been deposited into the Reclamation fund. Memorandum of Acting Associate Solicitor Elliott to Chief, Division of Program Coordination and Finance, Bureau of Reclamation, June 9, 1981.

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Sec. 23. (b) [Projects on navigable streams for water or power purposes unlawful except under a permit granted prior to June 10, 1920, or a license granted pursuant to this act—Projects on water defined as other than navigable to be licensed if interests of interstate or foreign commerce are involved.]—

* * * * *

NOTE OF OPINION

1. Licenses—Interstate power system

A Federal Power Commission license is required for the Taum Sauk pumped storage project of Union Electric Company because it utilizes the headwaters of a navigable river to generate energy for an interstate power system. The "interests of commerce" referred to in Section 23(b) of the Federal Power Act are not limited to navigation. *Federal Power Commission v. Union Electric Company,* 381 U.S. 90 (1965).

Pages 282-283

Sec. 24. [Power sites.]—

* * * * *

NOTE OF OPINION

1. Permission to enter and occupy Federal lands

Under sections 4(e) and 24 of the Federal Power Act the Federal Energy Regulatory Commission has the exclusive authority to authorize a licensee to enter and occupy Federal

lands for the purpose of developing water projects at governmental dams. Where the licensee is to install a powerplant at a Reclamation dam, the permission of the Water and Power Resources Service is not required. *Solano Irrigation District,* 14 FERC (CCH) ¶61,089, at 61,161 (1981).

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Sec. 30. [Exemption from licensing requirements authorized for hydroelectric facilities under 15 megawatts on manmade conduits.]—(a) Except as provided in subsection (b) or (c), the Commission may grant an exemption in whole or in part from the requirements of this part, including any license requirements contained in this part, to any facility (not including any dam or other impoundment) constructed, operated, or maintained for the generation of electric power which the Commission determines, by rule or order—

(1) is located on non-Federal lands, and

(2) utilizes for such generation only the hydroelectric potential of a manmade conduit, which is operated for the distribution of water for agricultural, municipal, or industrial consumption and not primarily for the generation of electricity.

(b) The Commission may not grant any exemption under subsection (a) to any facility the installed capacity of which exceeds 15 megawatts.

(c) In making the determination under subsection (a) the Commission shall consult with the United States Fish and Wildlife Service and the State agency exercising administration over the fish and wildlife resources of the State in which the facility is or will be located, in the manner provided by the Fish and Wildlife Coordination Act (16 U.S.C. 661, et seq.), and shall include in any such exemption—

(1) such terms and conditions as the Fish and Wildlife Service and the State agency each determine are appropriate to prevent loss of, or damage to, such resources and to otherwise carry out the purposes of such Act, and

(2) such terms and conditions as the Commission deems appropriate to insure that such facility continues to comply with the provisions of this section and terms and conditions included in any such exemption.

(d) Any violation of a term or condition of any exemption granted under subsection (a) shall be treated as a violation of a rule or order of the Commission under this Act. (§ 213, Act of November 9, 1978, 92 Stat. 3148; 16 U.S.C. § 823a)

EXPLANATORY NOTE

1978 Amendment. Section 213 of the Public Utility Regulatory Policies Act of 1978 (Act of November 9, 1978, Public Law 95-617, 92 Stat. 3117, 3148) amended Part I of the Federal Power Act by adding section 30. Extracts from the 1978 Act, not including section 213, appear in Volume IV in chronological order.

PATENTS TO DISABLED SOLDIER ENTRYMEN

Pages 286-287

[Sec. 1. Homestead and desert-land entrymen, incapacitated in World War, may make final proof and receive patent without further reclamation.]—*Repealed.*

EXPLANATORY NOTE

Act Repealed. Section 702 of the Federal Land Policy and Management Act of 1976 (Act of October 21, 1976, Public Law 94-579, 90 Stat. 2787) repealed the Act of March 1, 1921 (41 Stat. 1202). Extracts from the 1976 Act, including section 702, appear in Volume IV in chronological order.

WATER AND POWER WORKS IN NATIONAL PARKS

Pages 288-289

[Consent of Congress required to construct works within limits of any national park or national monument.]—

* * * * *

EXPLANATORY NOTE

Cross Reference, Hydroelectric Project in Sequoia National Park. The Act of December 14, 1974 (Public Law 93–522, 88 Stat. 1660) authorized the Secretary of the Interior to issue a permit to occupy and use lands of the United States within Sequoia National Park necessary for the continued operation, maintenance and use of the hydroelectric project known as Kaweah Number 3 Project of Southern California Edison Company. The Act further provides that the permit shall specifically recite that the privileges granted thereby are to be exercised in accordance with the Federal Power Act. The 1974 Act does not appear herein. For legislative history of the Act, see H.R. Rept. No. 1360 on H.J. Res. 444 and S. Rept. No. 1236 on S.J. Res. 237.

SUNDRY CIVIL EXPENSES APPROPRIATIONS ACT FOR 1922

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[Contributed funds—Expenditures.]—

* * * * *

NOTES OF OPINIONS

Reimbursement 1
Limitations 2-5
  Authorized programs and purposes 2
  Authorized Reclamation projects 3

1. Reimbursement

The Contributed Funds Act authorizes the Bureau of Reclamation to accept a contribution of $5,000,000 from the Westlands Water District to advance construction work on the distribution system and section 9(c) of the Reclamation Project Act of 1939 authorizes the Bureau to offset the value of the District's contribution by entering into a short-term (approximately five years) interim water service contract under which the District would be charged lower than the long-term rates. However, if the District's contribution is to be offset by charging it lower water rates for the short-term, then the cost of the facilities constructed with the contribution should be included in the total repayable actual cost of the distribution system to the District so that the United States, through payments made on the distribution system contract, will recoup the foregone water service revenues. Memorandum of Acting Associate Solicitor Miron to Commissioner of Reclamation, April 16, 1968,

2. Limitations—Authorized programs and purposes

Language in the Contributed Funds Act which authorizes the expenditure of funds for "any other development work . . . involving operations similar to those provided by the reclamation law" is not sufficient to authorize the Bureau of Reclamation to buy supplemental power to augment the capacity of the strictly limited Pick-Sloan Missouri Basin Project through the withdrawal of money from trust funds established by various preference customers, inasmuch as the Bureau has no general authority to purchase power to augment the capabilities of its various projects. Memorandum of Associate Solicitor Garner to Assistant Commissioner of Reclamation, February 6, 1975, in re proposal by Mid-West Electric Consumers Association, Inc.

The Contributed Funds Provision of the Sundry Civil Appropriations Act of March 4, 1921, does not authorize acquisition of additional right-of-way to expand the capacity of the San Luis Drain. Absent independent authorizing authority, the term "construction works" in the Contributed Funds Provision does not include land acquisition. The Contributed Funds Provision refers to work normally already authorized for the Bureau and to be done by the Bureau in direct relationship to its own programs. Memorandum of Associate Solicitor Hogan, March 7, 1967, to Regional Solicitor, Sacramento in re legal issues with respect to the construction of drainage facilities for San Luis Unit, CVP.

3.—Authorized Reclamation projects

The State of Texas could not use the Contributed Funds Act of March 4, 1921 to contribute to the United States the full cost of the proposed, but not authorized, Choke Canyon Dam and, in turn, have the Federal Government construct the dam at the State's expense, as monies contributed under the Act are to be used only to further construction of already authorized projects. Memorandum of Acting Associate Solicitor Robison to Commissioner of Reclamation, May 22, 1972, in re construction of water resources development projects in Texas.

Although the Bureau of Reclamation did for some time operate the Eklutna project, Eklutna is not a Reclamation project and is not subject to Reclamation law. Therefore, the Alaska Power Administration may not avail itself of the Contributed Funds Act of March 4, 1921, 41 Stat. 1404, to accept funds from the State of Alaska for work done in relocating an Alaska Power Administration transmission line. Memorandum of Associate Solicitor Morthland, May 19, 1971.

AMEND PATENTS TO DISABLED SOLDIER ENTRYMEN ACT

Page 295

[Homestead and desert-land entrymen, incapacitated in World War, may make final proof and receive patent without further reclamation.]—*Repealed.*

EXPLANATORY NOTE

Act Repealed. Section 702 of the Federal Land Policy and Management Act of 1976 (Act of October 21, 1976, Public Law 94-579, 90 Stat. 27878) repealed the Act of April 7, 1922 (42 Stat. 492). Extracts from the 1976 Act, including section 702, appear in Volume IV in chronological order.

SECOND DEFICIENCY APPROPRIATION ACT FOR 1924 (FACT FINDERS' ACT)

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Subsec. D. [Classification of lands—Different construction charges to be fixed against different classes of land.]—

* * * * *

NOTE OF OPINION

1. Construction charges, non-farm income considered

The imposition of an account charge, which would conform the total construction charge to the landowner's ability to pay by imposing a higher per acre charge on the owner of a small suburban tract not used for commercial farming, is consistent with subsection D of the Fact Finders' Act. Subsection D should not be so strictly construed as to require construction charges to be based solely on the acreage income from the land and without regard to the landowner's non-farm income because (1) the Secretary is merely "authorized", not directed, to fix different construction charges for different classes of land; (2) such apportionment should be done equitably; and, (3) charges should be fixed according to the productivity of the land only insofar as it is "practicable" to do so. Memorandum of Assistant Solicitor Mauro to Commissioner, Bureau of Reclamation, June 10, 1981.

Pages 320-323

Subsec. I. [Profits from projects taken over by water users.]—

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NOTES OF OPINIONS

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Recreation revenues 18

1. Application of credits

Subsection I of the Fact Finders' Act is not available to the Elephant Butte Irrigation District because they have not taken over the care, operation and maintenance of the project. Memorandum of Acting Solicitor Robison to Field Solicitor, Amarillo, November 8, 1972, in re disposition of miscellaneous revenues from Rio Grande Project.

7. Power revenues—Act of July 1, 1946

The Act of July 1, 1946 not only makes clear that under subsection I of the Fact Finders' Act power revenues are not to be distributed to individual water users after repayment of the construction costs of the project, it also confirms that revenues subject to disposition under subsection I may be applied to project purposes after project repayment instead of being deposited in the General Treasury as would be required by the Hayden-O'Mahoney Act. The same policy would apply to revenues from grazing lands. Solicitor Melich Opinion, M-36863, 79 I.D. 513 (August 8, 1972), in re Strawberry Valley Project, Utah.

17. Easement revenues

Revenues received by the United States, holder of legal title to Weber Basin Project lands, from the State of Utah for an easement across project lands for construction of interstate highway I-80 can be paid only to the United States and cannot be paid directly to the Weber River Water Users Association, who will eventually assume ownership of the project, as such revenues are not within the exceptions provided by subsections I and J of the Fact Finder's Act. Such revenues may, however, be paid into the reclamation fund and be credited to the project so as to be available to the Association for future project work. Memorandum of Acting Associate Solicitor Morthland to Regional Solicitor, Salt Lake City, May 1, 1969, as supplemented by Letter of Solicitor Melich to Mr. Earl Harris, May 28, 1969.

18. Recreation revenues

Where reclamation project grazing and farm land has been transferred to the administration of the Forest Service for recreation purposes pursuant to section 7(c) of the Federal Water Project Recreation Act, whether revenues generated by recreation use should be credited to the project by subsection I of the Fact Finders' Act or diverted to the land and water conservation fund depends upon whether a liberal or restricted interpretation is given to the preservation of existing contract rights in section 2(a) of the Land and Water Conservation Fund Act. However, even under the liberal interpretation, the amount of revenue which should be set aside for meeting the contractual commitment should be equivalent to what had been available when the land was under grazing or farm lease, because to apply to the contract additional revenue generated by recreational development undertaken with appropriated funds would constitute, in our opinion, an unauthorized gift of Federal property. Memorandum of Associate Solicitor Hogan to Commissioner of Reclamation, February 28, 1967.

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Subsec. J. [Moneys from sale or rental of water shall be credited to project or division of project to which construction cost has been charged.]—

* * * * *

Notes of Opinions

1. Application of credits

Revenues received by the United States, holder of legal title to Weber Basin Project lands, from the State of Utah for an easement across project lands for construction of interstate highway I-80 can be paid only to the United States and cannot be paid directly to the Weber River Water Users Association, who will eventually assume ownership of the project, as such revenues are not within the exceptions provided by subsections I and J of the Fact Finder's Act. Such revenues may, however, be paid into the reclamation fund and be credited to the project so as to be available to the Association for future project work. Memorandum of Acting Associate Solicitor Morthland to Regional Solicitor, Salt Lake City, May 1, 1969, as supplemented by Letter of Solicitor Melich to Mr. Earl Harris, May 28, 1969.

Revenues from the sale or rental of surplus water under the Warren Act continue to be credited to the project or division of the project to which the construction cost has been charged, as provided by subsection J of the Fact Finders' Act, and are not diverted to the land and water conservation fund by section 2(a) of the Land and Water Conservation Fund Act even though project lands have been transferred to the administration of the Forest Service for recreation purposes pursuant to section 7(c) of the Federal Water Project Recreation Act. Revenues under subsection J from the sale or rental of surplus water, and revenues from entrance, admission and recreation user fees under Section 2(a) are derived from totally different uses of different forms of property. Memorandum of Associate Solicitor Hogan to Commissioner of Reclamation, February 28, 1967.

Pages 325-326

Subsec. O. [Expense of Washington office and of general investigations not chargeable to water users.]—

* * * * *

EXPLANATORY NOTE

Cross Reference, Nonreimbursable Costs. The Act of October 29, 1971 (Public Law 92–149, 85 Stat. 416) provides that the cost of general engineering and research studies and certain other investigations, surveys, and studies shall be nonreimbursable. The Act appears in Volume IV in chronological order.

NOTE OF OPINION

1. Investigations and research

The Secretary of the Interior's authority to conduct research and development activity relating to the Reclamation program is implied in the legislation authorizing his program activities and has been expressly recognized by the Congress in subsection O of the Fact Finders' Act, 43 U.S.C. 377, which provides that the cost and expense of general investigations authorized by the Secretary shall be nonreimbursable. Memorandum of Associate Solicitor Hogan, April 14, 1967, in re authority to undertake research and development in high-voltage underground transmission.

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Subsec. P. [Reservation of easements or rights of way.]—

* * * * *

NOTE OF OPINION

1. Federal Land Policy and Management Act of 1976

Although the Federal Land Policy and Management Act of 1976 did not repeal the Fact Finders' Act, the 1976 Act is the latest expression of Congressional intent and should be used as the authority for grants of rights-of-way to the Bureau of Reclamation for project purposes and facilities on lands in the National Forest System and lands administered by the Bureau of Land Management whether those lands are withdrawn for reclamation purposes or not. The Fact Finders' Act can still be used as authority to reserve rights-of-way on public lands withdrawn for reclamation purposes and administered by the Bureau of Reclamation for project purposes. Memorandum of Associate Solicitor Leshy to Commissioner of Reclamation, June 26, 1979.

THE OMNIBUS ADJUSTMENT ACT

Page 360

Sec. 14. [Construction charges suspended.]—

*   *   *   *   *

EXPLANATORY NOTE

Codification Omitted. Subsection 14(a)(1) of the Omnibus Adjustment Act, which was added by the Act of June 23, 1932 (47 Stat. 331), originally was codified at 43 U.S.C. § 610 but was omitted from the 1976 and subsequent editions of the U.S. Code as having limited applicability.

Pages 376-387

Sec. 46. [No water delivery on new projects until contracts made by district for payment of costs—Cooperation of States—Appraisal and sale of lands in private ownership in excess of 160 acres—No water if owner refuses to sell—Payment required before right to receive water—Payments of operation and maintenance charges annually in advance—Public notice when water available.]—

*   *   *   *   *

EXPLANATORY NOTES

Supplementary Provision: Changes in Acreage Limitations, Pricing and Contracts. The Reclamation Reform Act of 1982 (Title II, Act of October 12, 1982, Public Law 97-293, 96 Stat. 1261, 1263, 43 U.S.C. §§ 390aa to 390zz-1) makes major changes in the acreage limitations on, the pricing of, and the contracts for the delivery of irrigation water from Reclamation projects. The 1982 Act appears in Volume IV in chronological order.

Supplementary Provision: Freedom from Limitations on Value of Subsequent Sales of Excess Lands. Section 209(f) of the Reclamation Reform Act of 1982 (Act of October 12, 1982, Public Law 97–293, 96 Stat. 1261, 1268, 43 U.S.C. § 390ii) provides that excess lands disposed of after the date of enactment of that Act may not receive irrigation water unless their title is burdened by a covenant prohibiting their sale, for a period of 10 years after their original disposal to comply with Reclamation law, for values exceeding the sum of the value of newly added improvements and the value of the land as increased by market appreciation unrelated to the delivery of irrigation water. It further provides that upon expiration of the terms of the covenant, the title to such lands shall be freed of the burden of any limitations on subsequent sale values which might otherwise be imposed by operation of section 46. The Reclamation Reform Act of 1982 appears in Volume IV in chronological order.

Supplementary Provision: Sale of Nonexcess Land Involuntarily Acquired into Excess Status. Section 224(e) of the Reclamation Reform Act of 1982 (Act of October 12, 1982, Public Law 97–293, 96 Stat. 1261, 1272, 43 U.S.C. § 390ww) provides that nonexcess land which is involuntarily acquired into excess status may be sold at its fair market value without regard to section 46, provided that if the status of mortgaged land changes from nonexcess into excess after the mortgage is recorded and is subsequently involuntarily acquired by the lender, such land may be sold at its fair market value. The Reclamation Reform Act of 1982 appears in Volume IV in chronological order.

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2. Repayment contracts—When required

The Flood Control Act of 1944 cannot be construed as a statutory grant to water users in the Missouri River Basin of a right to have stored waters from the Yellowtail and Boysen Reservoirs released, without a repayment contract, to augment the stream flow of the Yellowstone River. No language in the Act can be interpreted as creating such rights. Moreover, Reclamation statutes such as section 9(d) of the Reclamation Project Act of 1939 require the Secretary to enter into repayment contracts for the use of project waters. Finally, such interpretation would be contrary to the intent of the excess land requirements of section 46 of the Omnibus Adjustment Act of 1926 and fundamental Reclamation law, which require repayment contracts for water. *Environmental Defense Fund, Inc. v. Morton*, 420 F. Supp. 1037 (D. Mont. 1976), aff'd sub nom. *Environmental Defense Fund, Inc. v. Andrus*, 596 F.2d 848 (9th Cir. 1979).

11. Excess land laws—Generally

[Editor's Note: History of Pine Flat Dam Acreage Limitation Controversy. In 1957 Solicitor Bennett ruled that the reclamation laws, including the acreage limitation provisions, apply to contracts for irrigation water from Pine Flat reservoir. 64 I.D. 273 (1957); 65 I.D. 525 (1957). The Attorney General concurred. 41 Op. Atty. Gen. 377 (1958). Solicitor Bennett ruled that payment does not relieve landowners of the obligation to execute recordable contracts for excess lands as a condition to receiving water for those lands. 64 I.D. 273 (1957). Solicitor Barry concurred in 1961. 68 I.D. 370 (1961).

The dispute then shifted to the courts. A request by holders of private water rights in the Kings River for an injunction restraining officials of the Bureau of Reclamation and the Corps of Engineers from operating Pine Flat Dam in a manner that interferes with their water rights was denied. *Turner v. Kings River Conservation District*, 360 F.2d 184 (9th Cir. 1966). The United States brought suit to enjoin the Tulare Lake Canal Company from delivering project water to excess lands not covered by recordable contracts. In 1972 the district court held the statutes did not require this. *United States v. Tulare Lake Canal Company*, 340 F.Supp. 1185 (E.D. Cal. 1972). The court of appeals reversed. *United States v. Tulare Lake Canal Company*, 535 F.2d 1093 (9th Cir. 1976), cert. denied, 429 U.S. 1121 (1977). On remand, the district court found for the United States on the constitutional issues raised by the defendant. The court of appeals affirmed. *United States v. Tulare Lake Canal Company*, 677 F.2d 713 (9th Cir. 1982). On certiorari, the Supreme Court vacated the judgment and remanded the case with directions to dismiss it as moot. *Tulare Lake Canal Company v. United States*, 459 U.S. 1095 (1983). The Supreme Court's action was based upon enactment of section 212 of the Reclamation Reform Act of 1982 (Act of October 12, 1982, 96 Stat. 1269, 43 U.S.C. § 390*ll*) which, with certain exceptions, exempted lands receiving benefits from federal water resources projects constructed by the Corps of Engineers from the provisions of Reclamation law. The 1982 Act appears in Volume IV in chronological order.]

[Editor's Note: History of Imperial Valley Acreage Limitation Controversy. In a February 24, 1933 letter Secretary Wilbur ruled that the 160-acre limitation did not apply to lands in the Imperial Valley served by the All-American Canal because they had pre-existing water rights to Colorado River water. In 1964 Solicitor Barry overruled this position. 71 I.D. 496 (1964). In 1967 the Justice Department brought suit to enforce the 160-acre limitation but lost in the district court. *United States v. Imperial Irrigation District*, 322 F.

Supp. 11 (S.D. Cal. 1971). Although the Justice Department did not appeal this decision, a group of Imperial Valley residents led by Dr. Ben Yellen of Brawley, California, filed a protective notice of appeal and sought leave to intervene. The district court denied permission to intervene, but a panel of the court of appeals reversed the district court, allowed intervention, and validated the protective notice of appeal. See order of August 6, 1973 reprinted at 559 F.2d 543. Subsequently, the appeals court reversed the district court on the merits and held that the 160-acre limit applies to Imperial Valley lands. *United States v. Imperial Irrigation District*, 559 F.2d 509 (9th Cir. 1977), modified, 595 F.2d 524 (9th Cir. 1979), affirmed on rehearing, 595 F.2d 525 (9th Cir. 1979). The following year the Supreme Court reversed the court of appeals, holding that the 160-acre limit did not apply to the 424,145 acres of land in the Imperial Valley that had "present perfected rights" to irrigation water in 1929. *Bryant v. Yellen*, 447 U.S. 352 (1980).

Related litigation was filed by the Yellen group in 1969 to compel the Interior Department to enforce the residency requirement of section 5 of the Reclamation Act against Imperial Valley lands receiving water through the All-American Canal. The district court first ruled in the plaintiffs' favor on a motion for partial summary judgment, *Yellen v. Hickel*, 335 F. Supp. 200 (S.D. Cal. 1971), and reaffirmed this ruling following a trial on the merits. *Yellen v. Hickel*, 352 F. Supp. 1300 (S.D. Cal. 1972). The appeal from this decision was consolidated with the appeal from the acreage limitation decision. The court of appeals vacated the residency decision on the grounds that the plaintiffs lacked standing to sue. *United States v. Imperial Irrigation District*, 559 F.2d 509, 516-20 (9th Cir. 1977).]

Section 46 of the Omnibus Adjustment Act establishes restrictions on the use of water available only because of the construction of the facilities financed by the Government. Congress had the power to authorize such projects and to impose reasonable conditions, such as the acreage limitation, relevant to the Federal interest in the project and to the overall objectives thereof. *United States v. Tulare Lake Canal Co.*, 677 F.2d 713 (9th Cir. 1982), cert. granted, judgment vacated, and case remanded, with directions to dismiss as moot sub nom. *Tulare Lake Canal Co. v. United States*, 459 U.S. 1095 (1983). [Editor's Note: The Supreme Court's action was based upon enactment of section 212 of the Reclamation Reform Act of 1982 (Act of October 12, 1982, 96 Stat. 1269, 43 U.S.C. § 390*ll*) which, with certain exceptions, exempted lands receiving benefits from Federal water resources projects constructed by the Corps of Engineers from the provisions of Reclamation law. The 1982 Act appears in Volume IV in chronological order.]

It is a basic goal of the Reclamation laws to create family-sized farms in areas irrigated by Federal projects. It is also a basic goal of the Reclamation laws to secure the wide distribution of the substantial subsidy involved in Reclamation projects and limit private speculative gains resulting from the existence of such projects. Public lands on Reclamation projects are made subject to entry under the homestead laws in tracts of 160 acres or less in order to preserve the public domain for actual settlers. Similarly, the 160-acre limitation and the requirement in section 46 of the 1926 Act that excess lands be sold at prices excluding enhancement of value from the existence of the project were intended to effect the breakup of large tracts of private lands on Reclamation projects and assure the redistribution of such lands in small tracts at nonspeculative prices. *United States v. Tulare Lake Canal Company*, 535 F.2d 1093, 1119 (9th Cir., 1976), reversing 340 F. Supp. 1185 (E.D. Cal. 1972), cert. denied, 429 U.S. 1121 (1977).

Private irrigation diversions (those undertaken or financed independently of Federal Reclamation law) from main-stem Corps of Engineers reservoirs on the Missouri River and the Columbia River System are subject to Federal Reclamation law, including the "excess lands" provisions of section 5 of the Reclamation Act of 1902 and section 46 of the Omnibus Adjustment Act of 1926, and the water service contract requirements of section 9(c) of the Reclamation Project Act of 1939, unless (1) the private diverter's water supply does not depend on the existence or operation of Federal project facilities at any time during the irrigation season, and (2) the diversion does not interfere with the authorized purposes of the Federal project. Letter of April 27, 1970 from the Secretary to the Governors of ten States.

12.—Constitutionality

Since water users have no vested right to be relieved of acreage limitations by paying an allocable share of project construction costs, imposition of acreage limitations did not deprive them of a right without due process of law. *United States v. Tulare Lake Canal Co.*, 677 F.2d 713 (9th Cir. 1982), cert. granted, judgment vacated, and case remanded with directions to dismiss as moot sub nom. *Tulare Lake Canal Co. v. United States*, 459 U.S. 1095 (1983). [Editor's Note: The Supreme Court's action was based upon enactment of section 212 of the Reclamation Reform Act of 1982 (Act of October 12, 1982, 96 Stat. 1269, 43 U.S.C. § 390*ll*) which, with certain exceptions, exempted lands receiving benefits from Federal water resources projects constructed by the Corps of Engineers from the provisions of Reclamation law. The 1982 Act appears in Volume IV in chronological order.]

Differing conditions in different geographic areas may provide a reasonable basis for different legislative treatment. Territorial uniformity is not a constitutional prerequisite. Therefore, since the Reclamation statues are a rational legislative response to climatic differences between the western region and the remainder of the nation and provision for acreage limitations is a reasonable means of furthering the public purposes underlying these statutes, the fact that the acreage limitations are inapplicable east of the 100 degree meridian does not deny farmers west of that meridian equal protection of the laws. *United States v. Tulare Lake Canal Co.*, 677 F.2d 713 (9th Cir. 1982), cert. granted, judgment vacated, and case remanded with directions to dismiss as moot sub nom. *Tulare Lake Canal Co. v. United States*, 459 U.S. 1095 (1983). [Editor's Note: The Supreme Court's action was based upon enactment of section 212 of the Reclamation Reform Act of 1982 (Act of October 12, 1982, 96 Stat. 1269, 43 U.S.C. § 390*ll*) which, with certain exceptions, exempted lands receiving benefits from Federal water resources projects constructed by the Corps of Engineers from the provisions of Reclamation law. The 1982 Act appears in Volume IV in chronological order.]

13.—Construction with other laws

Supreme Court decisions holding that, in view of section 8 of the Reclamation Act of 1902, a state may impose conditions on the appropriation and distribution of water in a Federal Reclamation project which are not inconsistent with Congressional directives respecting the project, *California v. United States*, 438 U.S. 645 (1978), and that rights to water from the Colorado River that had been acquired in accordance with State laws and exercised by actual diversion and application of a specific quantity of water to a defined area of land before the effective date of the Boulder Canyon Project Act were not subject to the 160-acre limitation, *Bryant v. Yellen*, 447 U.S. 352 (1980), did not alter the conclusion that Congress intended by section 8 of the Flood Control Act of 1944 to make the acreage limitations of reclamation law, including those imposed by section 46 of the Omnibus Adjustment Act, apply to private lands receiving irrigation benefits from the Pine Flat Project. Although section 8 of the 1902 Act is applicable generally to the Pine Flat Project, the issue resolved in *California* was not the same as the issue involving the Pine Flat Project; the Court in *California* expressly reaffirmed an earlier holding that despite section 8 of the 1902 Act, the acreage limitations in section 5 of that Act preempt contrary State law and there is no reason why the acreage limitation in section 46 of the Omnibus Adjustment Act should have a different effect; and there is no exception in the Flood Control Act of 1944, applicable to the Pine Flat Project, equivalent to section 6 of the Boulder Canyon Project Act which the Court in *Bryant* read as exempting "present perfected rights" from the acreage limitations. *United States v. Tulare Lake Canal Co.*, 677 F.2d 713 (9th Cir. 1982), cert. granted, judgment vacated, and case remanded with directions to dismiss as moot sub nom. *Tulare Lake Canal Co. v. United States*, 459 U.S. 1095 (1983). [Editor's Note: The Supreme Court's action was based upon enactment of section 212 of the Reclamation Reform Act of 1982 (Act of October 12, 1982, Public Law 97-293, 96 Stat. 1269, 43 U.S.C. § 390*ll*) which, with certain exceptions, exempted lands receiving benefits from Federal water resources projects constructed by the Corps of Engineers from the provisions of Reclamation law. The 1982 Act appears in Volume IV in chronological order.]

The legislative history of section 8 of the Flood Control Act of 1944 shows that the Reclamation laws, including the acreage limitations of section 46 of the Omnibus Adjustment Act of 1926, apply to the Pine Flat project even though no irrigation works are constructed by the Secretary of the Interior. *United States v. Tulare Lake Canal Company*, 535 F.2d 1093, 1099-1118 (9th Cir. 1976), reversing 340 F. Supp. 1185 (E.D. Cal. 1972), cert. denied, 429 U.S. 1121 (1977).

The perfected water right to Colorado River water decreed pursuant to section 6 of the Boulder Canyon Project Act to the Imperial Irrigation District in *Arizona v. California*, 439 U.S. 419 (1979), for the irrigation of 424,145 acres of land and related uses, may be exercised by it without regard to the land limitation provisions of section 46 of the Omnibus Adjustment Act of 1926. *Bryant v. Yellen*, 447 U.S. 352,368-78 (1980), reversing *United States v. Imperial Irrigation District*, 559 F.2d 509 (9th Cir. 1977) and Solicitor Barry Opinion, 71 I.D. 496 (1964).

Residency upon the land remains a condition of the receipt of Federally subsidized irrigation water derived from Reclamation projects. Section 46 of the Omnibus Adjustment Act of 1926 substituted the system whereby irrigation districts supplied water to individual irrigators for the sale of water rights directly to landowners. Section 46 was not, however, intended by Congress to impliedly repeal the residency requirement of section 5 of the Reclamation Act of 1902, forbidding the sale of water rights "to any landowner unless he be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land." Effect should be given to both section 5 of the 1902 Act and section 46 of the 1926 Act, as there is no repugnancy between them. The 1915 and 1916 administrative decisions, interpreting the Act of August 9, 1912, to mean that residency was only a condition of the application for the delivery of water and that this requirement ceased when final water right certificates were issued, are erroneous and are overruled. Solicitor Krulitz Opinion, M-36919 (December 6, 1979). [Editor's Note: Section 211 of the Reclamation Reform Act of 1982 (Act of October 12, 1982, Public Law 97–293, 96 Stat. 1269, 43 U.S.C. § 390kk) removed residency as a prerequisite for delivery of irrigation water made available from the operation of Reclamation projects. See also 43 CFR § 426.14. The 1982 Act appears in Volume IV in chronological order.]

The Flood Control Act of 1944 cannot be construed as a statutory grant to water users in the Missouri River Basin of a right to have stored waters from the Yellowtail and Boysen Reservoirs released, without a repayment contract to augment the stream flow of the Yellowstone River. No language in the Act can be interpreted as creating such rights. Moreover, Reclamation statutes such as section 9(d) of the Reclamation Project Act of 1939 require the Secretary to enter into repayment contracts for the use of project waters. Finally, such interpretation would be contrary to the intent of the excess land requirements of section 46 of the Omnibus Adjustment Act of 1926 and fundamental Reclamation law which require repayment contracts for water. *Environmental Defense Fund, Inc. v. Morton*, 420 F. Supp. 1037 (D. Mont. 1976), aff'd sub nom. *Environmental Defense Fund, Inc. v. Andrus*, 596 F.2d 848 (9th Cir. 1979).

16.—Standing to sue

Congress enacted the Reclamation laws to provide small farmers with small tracts of land at nonspeculative prices. Therefore, a group of small farmers and would-be farmers has standing to request a preliminary injunction directing the Secretary of the Interior and the Commissioner of Reclamation to initiate public rule making proceedings as to criteria and procedures for approval of excess land sales, *National Land for People, Inc. v. Bureau of Reclamation*, 417 F. Supp. 449 (D.D.C. 1976), and to resist a challenge to such rules on environmental grounds, *County of Fresno v. Andrus*, 622 F.2d 436 (9th Cir. 1980).

Residents of the Imperial Valley desiring to purchase excess lands that would likely become available at less than market prices if the acreage limitations of section 46 of the Omnibus Adjustment Act of 1926 were enforced, have standing to appeal the District Court's decision refusing to enforce the acreage limitations. *Bryant v. Yellen*, 447 U.S. 352, 366-68 (1980), affirming *United States v. Imperial Irrigation District*, 559 F.2d 509, 520-524 (9th Cir. 1977) and 595 F.2d 525, 527-28 (9th Cir. 1979).

A group of small family farmers who do not receive water from the State Water Project and who do not allege particularized injury caused by the defendants' action and redressable by the requested relief lack standing to challenge the non-application of the 160-acre limitation to the State service area of the San Luis project. *Bowker v. Morton*, 541 F.2d 1347 (9th Cir. 1976).

18.—Payout, effect of

An administrative exemption from enforcement of the excess land laws is authorized under the provisions of former Solicitor Barry's 1961 Opinion, M-36634, 68 I.D. 370,405 (1961) where: (1) all construction costs of projects owing under a repayment contract had been paid out; (2) a general pattern of family sized ownership of farms had been established within an irrigation district, except for one large 3,634 acre parcel operated as a family business by a large number of family members; and (3) many landowners had contracted with the Government on the strength of an invalidated 1947 Solicitor's Opinion to prepay their construction charges and be released from the excess land laws. The removal of the acreage limitation provisions of the excess land laws is not automatic upon the full payment of construction charges, but depends upon a discretionary finding by the Secretary of the Interior that a pattern of family sized farms had been established. After the terms of the excess land law are lifted, owners are eligible to receive project water for their former excess holdings on an unrestricted basis. Letter of Secretary Andrus to Wayne P. Cunningham, memorandum to Assistant Secretary, and option paper, August 10, 1979, re Elephant Butte Irrigation District, New Mexico.

Owners of excess lands receiving project water may not avoid the obligation to execute recordable contracts providing for the sale of their excess lands at ex-project prices by prepaying their share of construction charges. *United States v. Tulare Lake Canal Company*, 535 F.2d 1093, 1118-1144 (9th Cir. 1976), reversing 340 F. Supp. 1185 (E.D. Cal. 1972), cert. denied, 429 U.S. 1121 (1977).

19.—Vested water rights

The perfected water right to Colorado River water decreed pursuant to section 6 of the Boulder Canyon Project Act to the Imperial Irrigation District in *Arizona v. California*, 439 U.S. 419 (1979), for the irrigation of 424,145 acres of land and related uses, may be exercised by it without regard to the land limitation provisions of section 46 of the Omnibus Adjustment Act of 1926. *Bryant v. Yellen*, 447 U.S. 352, 368-78 (1980), reversing *United States v. Imperial Irrigation District*, 559 F.2d 509 (9th Cir. 1977) and Solicitor Barry Opinion, 71 I.D. 496 (1964).

28.—Federal income tax

Sales of excess land will not be deemed to be a sale of property held by the taxpayer primarily for sale in the ordinary course of business by reason of any of the following: (1) the seller signed one or more recordable contracts; (2) land is sold in parcels of 160 acres or more; (3) the seller engages in sales promotion activities. Letter from Commissioner of Internal Revenue Cohen to Secretary Udall, April 16, 1968, in re disposition of excess lands to conform to the Federal Reclamation laws.

The 1954 Internal Revenue Code extended the provisions of the Federal income tax laws respecting involuntary conversions of property to sales of land made to conform to the excess land provisions of the Reclamation law. If a property, located within an irrigation project, is sold or otherwise disposed of to conform with the acreage limitation provisions of Reclamation law, the disposal shall be treated as an involuntary conversion for Federal tax purposes. The period for replacement of excess land disposed of under a recordable contract ends one year after the close of the first taxable year in which any part of the gain is realized from such sales. The District Director of Internal Revenue is authorized to grant an extension of the replacement period upon the taxpayer showing a reasonable cause for not being able to replace the converted property within the required time. The mere fact that excess lands are disposed of pursuant to a recordable contract does not necessarily mean that these types of lands were held primarily for sale to customers in the ordinary course of business. Letter from Commissioner of Internal Revenue Cohen to Secretary Udall, February 12, 1968, in re tax rulings regarding sales and other dispositions of land in order to conform to the acreage provisions of the Federal Reclamation laws.

31. Ownership of excess lands—Generally

If the holdings of any one landholder on all Reclamation projects exceed 160 acres, the landowner shall be deemed to be an excess landholder. Given its purpose and legislative history, there can be no doubt that section 5 of the Reclamation Project Act of 1902, which forbids the sale of the right to use water for land in private ownership for a tract exceeding 160 acres, imposes a limitation determined by holdings located on all projects. While the Bureau of Reclamation permitted landowners to receive Reclamation water up to 160 acres in each of the various Reclamation projects after the enactment of the Omnibus Adjustment Act of 1926, Congress never approved this practice. Congress has always intended that landholdings of any one landowner in excess of 160 acres be deemed excess holdings, no matter in which districts or projects they are located. Solicitor Krulitz Opinion, M-36919 (December 6, 1979).

32.—Coalescence of holdings, involuntary acquisition

Where, as a result of a divorce decree, the wife quitclaimed her one-half interest in 310.4 acres, the wife's interest in the property did not come within the Act of July 11, 1956, which allows water service not to exceed five years without regard to the acreage limitation where land is acquired by foreclosure, or other process of law, by conveyance in satisfaction of mortgages, or by inheritance or devise. Accordingly, the husband acquired his wife's interest in the 310.4 acres into excess status and he holds 150.4 acres in excess status. If water service to the 150.4 acres of excess land is to be eligible for project water in the hands of the purchasers, the land must be sold at a price not reflecting project benefits in accordance with section 46 of the Omnibus Adjustment Act. Memorandum of Associate Solicitor Leshy to Commissioner, May 30, 1980, in re request for sale price approval—Gene D. Reichert and Reichert Farms, Inc., to Duane D. and June M. Roechs—Columbia Basin Project, Washington.

If land which formerly was excess and was sold into nonexcess status with Sectetarial approval of the price before the Solicitor's Opinion of May 18, 1979, 86 I.D. 307, is thereafter acquired involuntarily into excess status, no approval of the price is required if it is sold within five years of the date of involuntary acquisition, but price approval is required if it is sold after five years. If formerly excess land which was sold into nonexcess status with Secretarial price approval after May 18, 1979, is thereafter acquired involuntarily into excess status, price approval is required for the sale whenever it occurs. This approach fairly balances the purpose of the July 11, 1956 Act, with the Congressional intent of limiting speculation in lands served with project water and precludes the possibility of windfalls accruing to those who involuntarily acquire formerly excess land into excess status. Memorandum of Solicitor Krulitz, August 7, 1979, supplemented by Memorandum of Associate Solicitor Leshy, January 17, 1980, in re control of the sale price of formerly excess land involuntarily acquired into excess status.

Where five brothers became excess landowners upon the death of their mother, who herself was an excess landholder, they were entitled, pursuant to the Act of July 11, 1956, 70 Stat. 524, to the temporary delivery of water only with respect to the portion of their mother's holdings which were nonexcess in her hands. They were not entitled to receive temporary water service for the portion of each of their holdings representing excess lands held by their mother during her life. Congress did not intend to put the heir in a better position than the testator had enjoyed. The brothers could not execute recordable contracts upon the portion of their holdings which became excess upon inheritance, inasmuch as initial delivery of water from the project had begun prior to the time that the brothers had inherited the land. Memorandum of Associate Solicitor Morthland to Assistant Regional Solicitor, Sacramento, September 30, 1969, in re excess lands: application of section 1 of the Act of July 11, 1956 to lands inherited by Thomas Perez, et al. (Westlands Water District).

The purpose of the Act of July 11, 1956 (70 Stat. 524), which amended section 3 of the Act of August 9, 1912 and section 46 of the Act of May 25, 1926, was to allow delivery of water for five years to excess lands involuntarily acquired by foreclosure, inheritance, or devise. Under both the 1912 Act and 1926 Acts, during the five-year period from the effective date of acquisition, the mortgagee, heir, or devisee is given the opportunity to unburden itself of holdings acquired in this manner just as if they were non-excess. There is no requirement of the 1912 Act as so amended that lands acquired in the manner described ever be sold at a price approved by the Secretary. Under the 1926 Act as amended, at the end of the five-year period, the price at which the land subject to the 1926 Act is sold must be approved by the Secretary. During the first five years, under that Act, there is no requirement that the Secretary approve the price at which lands involuntarily acquired are sold. Memorandum of Deputy Solicitor Weinberg to Regional Solicitor, Sacramento, December 15, 1967, in re price approval of excess land sold by mortgagee after foreclosure.

33.—State ownership

The acreage limitation provisions of the Reclamation law have no application to lands owned by the State of California in its Imperial Water Fowl Management Area. *United States v. Imperial Irrigation District*, 595 F. 2d 524 (9th Cir. 1979).

The United States District Court may entertain an action by the State of Washington alleging that government officials violated the Federal Reclamation laws by refusing to deliver project water to more than 160 acres of State school lands, where the amount in controversy is less than $10,000. *State of Washington v. Udall*, 417 F. 2d 1310 (9th Cir. 1969).

34.—Trusts and multiple ownerships

A partnership, even though willing to execute a recordable contract for its excess land holdings, would not meet the requirement in the January 16, 1975, joint memorandum of Commissioner Stamm and Associate Solicitor Garner holding that multiple ownership arrangements should only be approved if (1) there is a family relationship among the persons holding a beneficial interest therein or (2) the effect thereof is to break up large land holdings, where the only interest of investors in the partnership would be in dividends and profits received. Memorandum of Commissioner Stamm to Regional Director, Sacramento, January 28, 1977, in re Tri-Valley Water District—request for review of partnership agreement—Sun Dial Groves.

A limited partnership receiving water service for 676.83 acres prior to a 1975 Departmental decision which permitted service to excess lands held by a partnership only if there was family relationship among the persons having beneficial interests in the multiple ownership or if the effect of partnership holdings would be to break up large excess land holdings under recordable contract would not be entitled to water for an additional 200 acres purchased subsequent to the 1975 decision. The partnership would be entitled to continue to receive water for all 676.83 acres in accordance with criteria in effect prior to the 1975 decision. It is Departmental policy not to revoke previously acknowledged eligibility even if the Department's subsequent interpretations of law were to cast doubt upon whether ownership arrangements were in compliance with the law. Memorandum of Associate Solicitor Tidwell to Regional Solicitor, Sacramento, September 2, 1976, in re Excess land sale—United California Bank to Lamanuzzi and Pantaleo, a limited partnership—Delano-Earlimart Irrigation District.

A father may not, consistent with the 160-acre limitation, act as trustee in a trust in which his minor child is the beneficiary. Memorandum of Associate Solicitor Tidwell to Field Solicitor, Boise, July 2, 1976, in re trust for Holly Hirai, a minor.

So long as the grantor does not use the trust arrangement in an attempt to circumvent the 160-acre limitation, he is free to dispose of his property as he sees fit. Memorandum from Commissioner Stamm to Regional Director, Sacramento, August 18, 1975, in re use of trusts in satisfaction of recordable contract requirement under Reclamation law.

An arrangement whereby a corporation would, first, act as broker for the sale of excess lands to absentee owners purchasing for investment purposes and, second, actually farm the land, should be rejected as contrary to the long-standing tradition of administering the excess land laws to encourage family-sized farms. In the future, management agreements filed by a management firm in behalf of clients should be rejected outright. In order to qualify, a plan must assure to the purchaser the benefits of ownership, including the right to sell, lease, or farm the land and to fire the manager, and not be burdened with side arrangements which dilute ownership rights of purchasers. Joint Memorandum of Commissioner Stamm and Associate Solicitor Garner to the Regional Director and Regional Solicitor, Sacramento, June 30, 1975, in re promotion schemes to convert excess lands into nonexcess status.

The joint memorandum of the Commissioner of Reclamation and the Associate Solicitor, Energy and Resources, dated January 16, 1975, permitting multiple ownership where there is either a family relationship or to facilitate the breaking up of large holdings subject to a recordable contract, applies to multiple holdings of 160 acres or more. To prevent circumvention of the 160-acre limit, where delivery of water is requested by a limited partnership whose general partner will be acting as general partner for more than one limited partnership and for lands embracing more than 160 acres, those charged with reviewing the arrangement should assure that upon a majority vote the limited partners could: remove a general partner; terminate the partnership; amend the agreement; and sell all partnership assets. Joint Memorandum of Commissioner Stamm and Associate Solicitor Garner to the Regional Director and Regional Solicitor, Sacramento, June 11, 1975, in re multiple ownerships of nonexcess lands.

A growing number of proposals for the use of trusts in the disposal of excess lands have had as their purpose to attract investors whose only interest is profit from the operation of farms. Had they been accepted, the abandonment of the concept of family-sized farms, which under Reclamation law is the purpose of the 160-acre limitation, would have ensued.

In the future, multiple ownerships should not be approved unless (1) there is a family relationship among the persons having beneficial interests in the multiple ownership or (2) the effect of approving a multiple ownership of lands, presently subject to recordable contracts, is to break up large excess land holdings and the persons who are to participate as beneficiaries are identified at the time the plan is presented for approval of the Department of the Interior. Joint Memorandum of Commissioner Stamm and Associate Solicitor Garner to Regional Director and Regional Solicitor, Sacramento, January 16, 1975, in re excess lands—policy governing approval of multiple ownerships.

A proposal by a promoter to acquire lands to be served with water supplied from a Federal Reclamation project and delivered by the Madera County Irrigation District and subdivide it into 160-acre units to be operated as a limited partnership with sale of interests therein to persons having no interest in farming other than as an investment is not consistent with the purpose and substance of the Federal Reclamation laws. The proposal must be rejected for the same reason as that given by the Solicitor on July 13, 1973 in connection with the trust proposal of Agri-Lands, Ltd. Memorandum of Solicitor Frizzell to Regional Solicitor, Sacramento, November 27, 1973, in re excess land —American Agronomics Pacific Division, Inc.—limited partnerships.

The scheme of dissolution of excess lands located within the Westlands Water District whereby various 160-acre tracts would be subdivided into thousands of individual trusts, and offered to the public for investment in the same manner that corporate stock on interests in investment trusts is sold, is not the type of ownership of irrigable land that falls within the scope of the ownership and acreage restrictions of Reclamation law. Since the group of trusts envisioned in the proposal would be similar to a single corporation, the rule applicable to corporations and limiting them to no more water than necessary to irrigate 160 acres of land would be applicable no matter how much acreage would be accumulated under the proposed group of trusts. Letter from Solicitor Frizzell to Mr. B. Marian Den Hartog, Trustee, Fresno, California, July 13, 1973, in re Agri-Lands, Ltd.—irrevocable trusts.

Where land is held in trust for 15 separate ownership interests, but each beneficiary's right to possession is subject to the approval of owners of not less than 66⅔% of the beneficial interest in the trust property, the trust does not qualify as an appropriate device for the holding of excess land. The beneficial interest is not an "ownership" interest within the meaning of either section 46 of the Omnibus Adjustment Act or the Small Reclamation Projects Act. Memorandum of Acting Associate Solicitor Davis to the Regional Solicitor, Los Angeles, April 22, 1970, in re excess acreage receiving irrigation benefits under Small Reclamation Projects Act—Eastern Municipal Water District, California—Wolfskill Trust; *affirmed*, Letter of Associate Solicitor Morthland to William M. Fischback, May 11, 1971.

The sale, at a price approved by the Bureau of Reclamation, to 17 individuals, as trustees and tenants in common, of 2,193 acres held by a large landowner subject to recordable contract, was acceptable if the operating agreement between the purchasers and a farming corporation did not limit the right of the latter to partition their holdings. Memorandum of Associate Solicitor Miron to Regional Solicitor, Sacramento, March 3, 1969, in re sale of land owned by DiGiorgio Corporation—Arvin-Edison Water Storage District.

An arrangement whereby excess land holdings held by a corporation would be sold to eligible owners in tracts of 160 acres or less but combined to be farmed for a five-year term by a farm management company for orchard purposes accords with Reclamation law and administrative policy. The Department has heretofore acquiesced in the practice of combining non-excess holdings under a single lease for management purposes. The fact that some shareholders of the company managing the farm operation may be among the persons acquiring the excess landholdings of the corporation is no obstacle to the approval of the transaction. Memorandum of Associate Solicitor Miron to Regional Solicitor, Sacramento, January 30, 1969, in re sale of excess land, Arvin-Edison Water Storage District.

The Secretary of the Interior may permit the execution of recordable contracts as to 63 acres of the 223 acres held by a partnership and deemed by the Bureau of Reclamation to be non-excess holdings, prior to a 1965 ruling of the Solicitor declaring only 160 acres thereof to be non-excess lands. There is discretionary authority in the Secretary to ratify the sale at the price at which the 63 acres deemed excess land had been sold, if the sale had been consummated prior to the 1965 ruling. If these lands had not been sold prior to the ruling, the Secretary must approve the purchase price. Memorandum of Associate Solicitor Miron to Regional Solicitor, Sacramento, November 12, 1968, in re excess lands, execution of recordable contracts.

Where land is held in tenancy in common, the tenant with the largest undivided interest is the key to calculating the total eligible acreage that can receive water, because no tenant may enjoy the benefit of more than 160 eligible acres. Memorandum of Associate Solicitor Miron, October 9, 1968.

A trust agreement, failing to qualify under existing criteria, could be modified so as to be acceptable if the trustee, holding 238.01 acres, subjects the 78.01 acres thereof deemed excess to a recordable contract and within ten years conveys a one-third interest in the trust, including the 78.01 acres of excess lands, to the oldest child when the latter reaches age thirty. This would leave the remaining land in trust eligible to receive water for the use of the two remaining beneficiaries. Memorandum of Solicitor Weinberg to Regional Solicitor, Sacramento, June 17, 1968, in re Jones-Smith Trust Agreement—Westlands Water District, Central Valley Project.

There is no objection to spendthrift trusts when the trust corpus is 160 acres or less and there is no more than one beneficiary. Should the trust exceed 160 irrigable acres the trust would not comply with the excess land law requirements. Spendthrift provisions are not normally acceptable in trusts of more than 160 acres and with several beneficiaries, as they detract from the beneficiary's right of alienation and partition. Spendthrift provisions in a multiple beneficiary trust may, however, be considered as to any given beneficiary if adequate justification is shown, such as the beneficiary's incompetence. The mere lack of confidence of a parent in the maturity of his children to handle property does not justify relaxation of the fundamental statutory requirement of ownership contained in section 46 of the Omnibus Adjustment Act of 1926. Memorandum of Deputy Solicitor Weinberg to Regional Solicitor, January 22, 1968, in re Proposed trust involving excess land—Clifford Koster Hospital Water District—Delta-Mendota Canal, Central Valley Project.

The transfer of 1909 acres of excess lands held by a family corporation in 26 undivided interests to 26 newly formed corporations, where each of the 26 shareholders of the parent corporation was given all of the stock of one of the new corporations and the parent corporation was dissolved, and the new corporations contracted with an unincorporated business entity to manage the farm operation, complies with the three principles of Solicitor's Opinion, M-36729, April 22, 1968, where no fradulent purpose to evade the 160-acre limitation exists. Memorandum of Associate Solicitor Morthland to Regional Solicitor, Sacramento, in re recordable contracts of Perelli-Minetti Corporation.

35.—Corporations

The General Accounting Office would have no legal basis to challenge the plan of the Bureau of Reclamation to permit large landholding corporations, required by recordable contract to dispose of thousands of acres of excess land at the end of a ten-year period, to dispose of excess holdings within the ten-year period in a step-down process (sales of 5,000 acre tracts to purchasers of 1,000 acre tracts, who would subdivide the lands into 160 acre tracts). Assuming that the Secretary of the Interior carries out his duty to approve the prices at which lands may be sold during the ten-year period, land speculation would not be permitted in the planned phased disposal of the large corporate landholdings. There is no requirement that excess land holders sell excess landholdings into small farms as soon as possible. Letter from Comptroller General Staats to Congressman B. F. Sisk, B-169126, September 18, 1974, in re disposal of excess lands in the Westlands Water District.

When there is no recordable contract applicable to excess lands held by a closely-held corporation, the existing rules attributing land ownership to its stockholders will be enforced so that corporate ownerships cannot be used to circumvent the excess land law. Memorandum of Acting Solicitor Long to Regional Solicitor, Sacramento, March 19, 1974, in re stock transfers in a closely-held corporation owning excess lands subject to a recordable contract under Reclamation law.

The scheme of dissolution of excess lands located within the Westlands Water District, whereby various 160-acre tracts would be subdivided into thousands of individual trusts and offered to the public for investment in the same manner that corporate stock on interests in investment trusts is sold, is not an acceptable utilization of the trust device un-

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der the ownership and acreage restriction of Reclamation law. Since the group of trusts envisioned in the proposal would be similar in object and effect to a single corporation having shareholders, the rule applicable to corporations limiting them to no more water than necessary to irrigate 160 acres of land would be applicable no matter how much acreage would be accumulated under the proposed group of trusts. Letter from Solicitor Frizzell to Mr. B. Marian Den Hartog, Trustee, Fresno, California, July 13, 1973, in re Agri-Lands, Ltd.—irrevocable trusts.

The sale, at a price approved by the Bureau of Reclamation, to 17 individuals as trustees and as tenants in common of 2, 193 acres held by a large landowner subject to recordable contract was acceptable if the operating agreement between the purchasers and a farming corporation did not limit the right of the latter to partition their holdings. Memorandum of Associate Solicitor Miron to Regional Solicitor, Sacramento, March 3, 1969, in re sale of land owned by DiGiorgio Corporation—Arvin-Edison Water Storage District.

For the purpose of applying the excess land laws, a corporation which is a stockholder in another corporation is treated in the same manner as an individual stockholder. A parent corporation is the beneficial owner of all lands held by its wholly owned subsidiary and the two corporations are limited to 160 eligible acres in a water district. The fact that the land was transferred from subsidiary to parent for tax reasons rather than to avoid the excess land laws does not permit more than 160 acres to receive project water. Letter of Solicitor Weinberg to Robert L. Pierce, M-36755, October 7, 1968, in re Southern Pacific Land Company.

Wholly-owned subsidiaries to which parent corporation assigned 160 acres of land within an irrigation district for a nominal consideration would not be entitled to receive water because the parent had not divested itself of the beneficial interest in the lands conveyed. The rule that no corporation may hold more than 160 irrigable acres of land applies. It was error to contend that the excess land law applied only to public lands settled by a homesteader. The Reclamation Act of 1902 expressly recognized service to private land and limited the amount of water that could be supplied to that needed to irrigate 160 acres in private ownership. Memorandum of Solicitor Weinberg to Mr. Alan C. Furth, Southern Pacific Company, San Francisco, California, June 25, 1968, in re eligibility of eight subsidiaries of Southern Pacific Company located in Arvin-Edison Water Storage District to secure project water.

Where the irrigator owned 145.3 acres individually, including 39.2 acres with respect to which it had executed a recordable contract, and had assigned his undivided interest in an additional 100.3 acres to a family held corporation, approximately 60 acres of the latter, an amount proportionate to the irrigator's 60% ownership of the corporate capital stock, was considered the irrigator's property for excess land purposes. Accordingly, the irrigator was deemed in substantial compliance with the acreage limitation except for the small amount (6.2 acres) by which the irrigator's landholdings, as so calculated, exceeded the acreage under recordable contract. Acting Solicitor Weinberg Opinion, M-36730 (April 22, 1968).

36.—Lease-purchase

The husband and wife operators of land under a seven-year lease with option to purchase, where the annual payments are substantial and the lessor-sellers have abdicated all of the meaningful prerogatives of ownership, must be regarded as owners of the land and are not entitled to delivery of water for more 320 acres. Memorandum of Assistant Solicitor London to Field Solicitor, Boise, January 25, 1977.

37.—Groundwater

Repayment contracts to be executed with owners of land served with pumped ground water should prohibit the use of this type of water on excess lands unless the landowners agree to be bound by a recordable contract. Memorandum from Associate Solicitor Tidwell to Field Solicitor, Boise, September 27, 1976, in re excess lands—application of section 46 of the Act of May 25, 1926, to lands pumping groundwater, Quincy Subarea, Columbia Basin Project, Washington.

41. Pre-existing holdings—Generally

Section 46 of the Omnibus Adjustment Act of May 25, 1926 superseded section 12 of the Reclamation Extension Act of August 13, 1914, thus eliminating the requirement in the 1914 Act that the Secretary of the Interior must have executed recordable contracts with all excess landowners to dispose of their excess lands at Government-approved prices before construction work on a reclamation project could begin. Section 46 allows construction to proceed even though all the excess landowners have not executed recordable contracts, but prohibits the delivery of water to excess land until a recordable contract for its sale has been executed. *United Family Farmers v. Kleppe*, 552 F.2d 823 (8th Cir. 1977), affirming 418 F. Supp. 591 (D.S.D. 1976).

43.—Recordable contracts

Generally, a partnership may place excess land under recordable contract and be eligible to receive a water supply for such excess during the disposal period allowed by the recordable contract. Memorandum of Commissioner Stamm to Regional Director, Sacramento, January 28, 1977, in re Tri-Valley Water District—request for review of partnership agreement—Sun Dial Groves.

Section 46 of the Omnibus Adjustment Act permits a landowner to enter into a recordable contract with the Secretary under which he agrees to sell his excess lands over a specified time period to eligible owners at regulated prices, in exchange for which he would be able to receive project water for the specified period of time. Letter from Solicitor Austin to Senator Abourezk, December 21, 1976.

So long as the grantor does not use the trust arrangement in an attempt to circumvent the 160-acre limitation, he is free to dispose of his property as he sees fit. Memorandum from Commissioner Stamm to Regional Director, Sacramento, August 18, 1975, in re use of trusts in satisfaction of recordable contract requirement under Reclamation law.

The General Accounting Office would have no legal basis to challenge the plan of the Bureau of Reclamation to permit large landholding corporations, required by recordable contract to dispose of thousands of acres of excess holdings within the ten-year period, to dispose of excess holdings within the ten-year period in a step-down process (sales of 5,000-acre tracts to purchasers of 1,000-acre tracts, who would subdivide the lands into 160-acre tracts). Assuming that the Secretary of the Interior carries out his duty to approve the prices at which lands may be sold during the ten-year period, land speculation would not be permitted in the planned phased disposal of the large corporate landholdings. There is no requirement that excess land holders sell excess landholdings into small farms as soon as possible. Letter from Comptroller General Staats to Congressman B. F. Sisk, B-169126, September 18, 1974, in re disposal of excess lands in the Westlands Water District.

Where five brothers became excess landowners upon the death of their mother, who herself was an excess landholder, they were entitled, pursuant to the Act of July 11, 1956, 70 Stat. 524, to the temporary delivery of water only with respect to the portion of their mother's holdings which were nonexcess in her hands. They were not entitled to receive temporary water service for the portion of each of their holdings representing excess lands held by their mother during her life. Congress did not intend to put the heir in a better position than the testator had enjoyed. The brothers could not execute recordable contracts upon the portion of their holdings which became excess upon inheritance, inasmuch as initial delivery of water from the project had begun prior to time that the brothers had inherited the land. Memorandum of Associate Solicitor Morthland to Assistant Regional Solicitor, Sacramento, September 30, 1969, in re excess lands: application of section 1 of the Act of July 11, 1956 to lands inherited by Thomas Perez, et al. (Westlands Water District).

Where 300 acres had been divided into life estates, the life tenants, even though their estates are less than a full fee, are nevertheless tenants in common in a freehold estate. Any recordable contract must be executed both by the life tenants and the remaindermen. A recordable contract signed only by the life tenants would not meet the objective that land be disposed of to an eligible owner. To be meaningful, a sale of excess land to an eligible owner must include all of the interests necessary to compose a fee simple estate in the arable surface of the land. Memorandum of Acting Associate Solicitor Morthland to Regional Solicitor, Sacramento, California, April 16, 1969, in re Westlands Water District, excess land placed under recordable contract, approval of nonexcess designation—Mary Georgene Walker.

The Secretary of the Interior has discretionary authority to permit a purchaser of excess lands to assume an outstanding recordable contract covering the excess lands, under circumstances where the sale is involuntary. There is no discretionary authority however, to permit a purchaser of lands after the date of initial water delivery to execute a recordable contract for such lands. Letter of Acting Solicitor Coulter to Ralph M. Brody, M-36774, February 28, 1969.

44.—Anti-speculation

In view of court decisions holding that section 46 of the Omnibus Adjustment Act of 1926 applies to the sale of formerly excess land as well as the necessity recognized by Congress to prevent speculators from profiting from the Federal investment in Reclamation projects, the Secretary of the Interior is required after the date of this opinion to control and approve the purchase price of both the initial sale of excess land and the resale of formerly excess land until one half of the construction charges allocated to the land has been paid. The words "approved by the Secretary," as used in that portion of section 46 empowering the Secretary to approve the price at which excess and formerly excess lands are sold, requires that the approved price be established without any reference to the Federal project. All new contracts between the Bureau of Reclamation and irrigation districts shall include a clause which expressly provides for the control of the sales price of formerly excess land. The teletyped message to the Washington Office of the Bureau of Reclamation from the Bureau's Regional Counsel Coffey in California, dated August 23, 1949, and the June 8, 1951 memorandum from Regional Counsel Graham to the District Manager Fresno, California, holding that section 46 provides for no control of the sale price of formerly excess lands, are overruled. Solicitor Krulitz Opinion, 86 I.D. 307 (May 18, 1979), in re Reclamation Law—control of the sale price of formerly excess land.

After passage of the Act of October 1, 1962 (Public Law 87-728) the holder of excess lands on the Columbia Basin Project must sell those lands at a price approved by the Secretary of the Interior, until one-half of the construction charges are paid, if the land is to receive project water after the sale. The fact that the lands were subject to a recordable contract, executed under section 2 of the Act of March 10, 1943, 57 Stat. 14, eliminating the price-approval requirement five years after notice of availability of project water, did not give the landowner a vested right against extension of the price-approval requirement thereafter. *Israel v. Morton*, 549 F. 2d 128 (9th Cir. 1977).

Where formerly excess lands are initially sold to a nonexcess purchaser at a price approved by the Secretary of the Interior, Secretarial approval is not required when the purchaser proposes to resell the lands to another nonexcess purchaser. Letter of Assistant Solicitor London to California Deputy Attorney General Gregory K. Wilkinson, December 10, 1976.

It was not fraud, within the meaning of section 46 of the Omnibus Adjustment Act of 1926 and the repayment contract between the Bureau of Reclamation and the irrigation district permitting the cancellation of water rights upon proof of fraudulent misrepresentation of the consideration for the sale of excess land, where: the approved price for the sale of land was $550 per acre; the average price for the sale of both the excess and nonexcess land was $900 per acre; and the Government made no provision for the reporting of the price at which non-excess lands were sold, but had no insurmountable bar to the timely discovery of the price at which the tract was sold. Given the lack of express statutory definition of the terms "true consideration" and "fraudulent representation," Congress deliberately left to the Secretary the task of defining these terms on a case-by-case basis in light of Federal common law and the statutory objective of discouraging land monopolization and speculation inhibiting holders of excess land from realizing the value of appurtenant water rights derived from Federal Reclamation projects. *Diedrich Brothers et al. v. Bureau of Reclamation*, 81 I.D. 412 (1974).

It is not necessary that the Secretary of the Interior approve the price at which stock in a closely-held corporation owning excess lands subject to a recordable contract is sold. While shares of such corporations may in the meantime be transferred at speculative prices to ineligible owners, such transfers will be at the peril of persons who buy stock, as the land will have to be sold to eligible owners at nonspeculative prices, approved by the Secretary, when the 10-year period under the recordable contract expires. Persons contemplating the dissolution of such corporation and the acquisition of its lands are put on notice that this would be suspect. Project water will not be delivered unless the principals of any such transaction can establish, to the satisfaction of the Secretary of the Interior, that it is not their purpose to frustrate the authority of the Secretary of the Interior respecting the sale of excess lands. Memorandum of Acting Solicitor Long to Regional Solicitor, Sacramento, March 19, 1974, in re stock transfers in a closely-held corporation owning excess lands subject to a recordable contract under Reclamation law.

The General Accounting Office would have no legal basis to challenge the plan of the Bureau of Reclamation to permit large landholding corporations, required by recordable contract to dispose of thousands of acres of excess land at the end of a ten-year period, to dispose of excess holdings within the ten-year period in a step-down process (sales of 5,000-acre tracts to purchasers of 1,000-acre tracts, who would subdivide the lands into 160-acre tracts). Assuming that the Secretary of the Interior carries out his duty to approve the prices at which lands may be sold during the ten-year period, land speculation would not be permitted in the planned phased disposal of the large corporate landholdings. There is no requirement that excess land holders sell excess landholdings into small farms as soon as possible. Letter from Comptroller General Staats to Congressman B. F. Sisk, E-169126, September 18, 1974, in re disposal of excess lands in the Westlands Water District.

Assuming the Secretary of the Interior properly carries out his duty to approve the prices at which excess lands are sold, the General Accounting Office concurs with the Interior Department that the provisions of a proposed repayment contract with the Westlands Water District permitting the sale of excess lands by large corporations to a single buyer for resale purposes would not leave extensive room for land speculation by large landowners. Letter from Comptroller General Staats to Congressman B.F. Sisk, B–169126, September 18, 1974, in re disposal of excess lands in the Westlands Water District.

The Secretary of the Interior has discretionary authority to waive price approval on a transfer of excess lands. This authority is extraordinary and is to be exercised only on a case-by-case basis. Letter of Acting Solicitor Coulter to Ralph M. Brody, M–36774, February 28, 1969.

[Editor's note: See also notes under "32.—Coalescence of holdings, involuntary acquisition."]

APPOINTMENT OF COMMISSIONER OF RECLAMATION

Page 390

[Reclamation of arid lands shall be administered by Commissioner of Reclamation—Salary—Advice and consent of Senate.]—Under the supervision and direction of the Secretary of the Interior, the reclamation of arid lands, under the act of June 17, 1902, and acts amendatory thereof and supplementary thereto, shall be administered by a Commissioner of Reclamation who shall receive a salary of $_____ per annum, and who shall be appointed by the President by and with the advice and consent of the Senate. (44 Stat. 657; Act of October 12, 1982, 96 Stat. 1261, 1274; 43 U.S.C. § 373a).

EXPLANATORY NOTES

1982 Amendment. Section 229 of the Reclamation Reform Act of 1982 (Act of October 12, 1982 Public Law 97-293, 96 Stat. 1261, 1274) amended the Act of May 26, 1926 by adding the words "by and with the advice and consent of the Senate" after the word "President". The 1982 Act appears in volume IV in chronological order.

Commissioner's Salary. The Commissioner's salary originally was set at $10,000, but it has been raised numerous times by Congress since then.

COLORADO RIVER FRONT WORK AND LEVEE SYSTEM

Pages 401-403

[Appropriation authorization for Colorado River front work and levee system—Federal expenditures not to be deemed as recognition of United States responsibility—Local communities may be required to provide rights-of-way and maintenance—Reimbursements to be covered into the Treasury—Provisions of 1944 Act not affected.]—

* * * * *

NOTE OF OPINION

1. Authority to dredge.

The 1946 amendment to the Act of January 21, 1927 authorizes the Bureau of Reclamation to dredge about 80 acres of Moovalya marsh and convert it into open water to accommodate boating so long as it is intended for and will be open to public boating. The possibilities that the area may also be used for a kilo racecourse and that the spoil from the dredging may be used to create dry land do not detract from the Bureau's basic authority under the Act to conduct dredging operations. Memorandum of Associate Solicitor Robison to Commissioner of Reclamation, April 25, 1974, in re Lower Moovalya development—Colorado River Front Work and Levee System.

COMPENSATION TO CITIZENS NEAR HATCH, N. MEX. FOR FLOOD DAMAGES

Page 404

[Sec. 1. Survey for determination of property loss—Payment.]—

*   *   *   *   *

Sec. 2. [Appropriation authorized.]—

*   *   *   *   *

Explanatory Note

Supplementary Provision; Limited Repeal. The Act of March 4, 1933 (Private Law 312, 47 Stat. 1763) provides as follows: "That the Secretary of the Interior is authorized and directed to investigate, ascertain the amount of, and to pay damages sustained by Ydelfonso Rodriguez, Andres Bustamante, residing at or in the vicinity of Hatch and Santa Teresa, New Mexico, or whose property is located in that vicinity and was damaged by the overflow of the Rio Grande River on August 17, 1921, in the manner and to the extent authorized by the Act approved February 25, 1927 (44 Stat. L. pt. 3, p. 1792), without regard to the citizenship of the owners of property so damaged: *Provided*, That not more than $800 shall be expended in making said two settlements.

"Sec. 2. Such parts of the Act of February 25, 1927, and Acts supplementary thereto as are in conflict with the provisions of this Act are hereby repealed." The 1933 Act does not appear herein.

BOULDER CANYON PROJECT ACT

Pages 414-417

[Sec. 1. Dam at Black or Boulder Canyon for flood control, improving navigation, and for storage and delivery of water—Main canal to supply water for Imperial and Coachella Valleys—Power plant—All works in conformity with Colorado River compact.]—

* * * * *

NOTES OF OPINIONS

Excess lands 17
River regulation 3

3.—River regulation

The Bureau of Reclamation is not required to obtain a discharge permit from the Corps of Engineers under section 13 of the Rivers and Harbors Act of 1899 concerning the sediment discharges from the desilting basins of the All-American Canal at Imperial Dam to the California Sluiceway Channel. In support of this conclusion are the facts that 1) the desilting operations are clearly authorized by section 1 of the Boulder Canyon Project Act, 2) the proviso in section 13 states that the prohibition against discharges does not apply to operation in connection with improvements of navigable waters or to the construction of public works considered necessary and proper by officials supervising such improvements or public works, 3) the desilting operations do not discharge or deposit refuse matter but merely re-rout sediment which is already part of the river, and 4) the desilting operations are part of the Secretary's overall river operations to carry out statutory responsibilities and to assist in meeting international treaty obligations to Mexico. Memorandum of Regional Solicitor Meade to Regional Director, Boulder City, May 5, 1972.

17. Excess lands

[Editor's Note: History of Imperial Valley Acreage Limitation Controversy. In a February 24, 1933 letter Secretary Wilbur ruled that the 160-acre limitation did not apply to lands in the Imperial Valley served by the All-American Canal because they had pre-existing water rights to Colorado River water. In 1964 Solicitor Barry overruled this position. 71 I.D. 496 (1964). In 1967 the Justice Department brought suit to enforce the 160-acre limitation but lost in the district court. *United States v. Imperial Irrigation District*, 322 F. Supp. 11 (S.D. Cal. 1971). Although the Justice Department did not appeal this decision, a group of Imperial Valley residents led by Dr. Ben Yellen of Brawley, California, filed a protective notice of appeal and sought leave to intervene. The district court denied permission to intervene, but a panel of the court of appeals reversed the district court, allowed intervention, and validated the protective notice of appeal. See order of August 6, 1973 reprinted at 559 F.2d 543. Subsequently, the appeals court reversed the district court on the merits and held that the 160-acre limit applies to Imperial Valley lands. *United States v. Imperial Irrigation District*, 559 F.2d 509 (9th Cir. 1977), modified, 595 F.2d 524 (9th Cir. 1979), reaffirmed on rehearing, 595 F.2d 525 (9th Cir. 1979). The following year the Supreme Court reversed the court of appeals, holding that the 160-acre limit did not apply to the 424,145 acres of land in the Imperial Valley that had "present perfected rights" to irrigation water in 1929. *Bryant v. Yellen*, 447 U.S. 352 (1980).

Related litigation was filed by the Yellen group in 1969 to compel the Interior Department to enforce the residency requirement of section 5 of the Reclamation Act against Imperial Valley lands receiving water through the All-American Canal. The district court first ruled in the plaintiffs' favor on a motion for partial summary judgment, *Yellen v. Hickel*, 335 F. Supp. 200 (S.D. Cal. 1971), and reaffirmed this ruling following a trial on the merits. *Yellen v. Hickel*, 352 F. Supp. 1300 (S.D. Cal. 1972). The appeal from this decision was consolidated with the appeal from the acreage limitation decision. The court of appeals vacated the residency decision on the grounds that the plaintiffs lacked standing to sue. *United States v. Imperial Irrigation District*, 559 F.2d 509, 516-20 (9th Cir. 1977).]

The perfected water right to Colorado River water decreed pursuant to section 6 of the Boulder Canyon Project Act to the Imperial Irrigation District in *Arizona v. California*, 439 U.S. 419 (1979) for the irrigation of 424,145 acres of land and related uses may be exercised by it without regard to the land limitation provisions of section 46 of the Omnibus Adjustment Act of 1926. *Bryant v. Yellen*, 447 U.S. 352, 368-78 (1980), reversing *United States v. Imperial Irrigation District*, 559 F.2d 509 (9th Cir. 1977) and Solicitor Barry Opinion, 71 I.D. 496 (1964).

Pages 431-432

Sec. 6. [River regulation, improvement of navigation, flood control—Irrigation and domestic use—Power—Title of dam to remain in United States—Contracts of lease of a unit or units of Government-built with right to generate electrical energy—Rules and regulations regarding maintenance of works to be in conformity with Federal water power act—Issuance of power permits or licenses.]—

* * * * *

NOTES OF OPINIONS

Power 3
Present perfected rights 4

3. Power

Reports that the Imperial Irrigation District's net power operating revenues are at most slightly over 7% of total power assets do not make a threshold showing that the Secretary of the Interior has abused whatever discretion or disregarded whatever duty to regulate the District's power rates which he might have under section 6 of the Boulder Canyon Project Act or the resale rate article in contracts for the sale of power from Davis and Glen Canyon Dams. *Yellen v. Morton*, 480 F.2d 1185 (D.C. Cir. 1973).

Neither the Boulder Canyon Project Act of 1928, the Federal Power Act, nor any contracts entered into between the United States and the Municipal Irrigation District, pursuant to the Project Act, require the Secretary of the Interior to regulate rates on the sale of electricity produced at power plants owned and operated by the Imperial Irrigation District. *Yellen v. Hickel*, Civil Action No 297–70 (D.D.C. 1972), affirmed per curiam on other grounds sub nom. *Yellen v. Morton*, 480 F.2d 1185 (D.C. Cir. 1973).

4. Present perfected rights.

The perfected water right to Colorado River water decreed pursuant to section 6 of the Boulder Canyon Project Act to the Imperial Irrigation District in *Arizona v. California*, 439 U.S. 419 (1979) for the irrigation of 424,145 acres of land and related uses may be exercised by it without regard to the land limitation provisions of section 46 of the Omnibus Adjustment Act of 1926. *Bryant v. Yellen*, 447 U.S. 352, 368-78 (1980), reversing *United States v. Imperial Irrigation District*, 559 F.2d 509 (9th Cir. 1977) and Solicitor Barry Opinion, 71 I.D. 496 (1964).

Pages 434-436

Sec. 9. [Lands capable of irrigation and reclamation by irrigation works—Entry under reclamation laws—Preference in entry to soldiers.]—Lands found to be practicable of irrigation and reclamation by irrigation works and withdrawn under the Act of March 6, 1946 (43 U.S.C 617(h)) shall be opened for entry, in tracts varying in size but not exceeding one hundred and sixty acres, as may be determined by the Secretary of the

Interior, in accordance with the provisions of the reclamation law, and any such entryman shall pay an equitable share in accordance with the benefits received, as determined by the said Secretary, of the construction cost of said canal and appurtenant structures; said payments to be made in such installments and at such times as may be specified by the Secretary of the Interior, in accordance with the provisions of the said reclamation law, and shall constitute revenue from said project and be covered into the fund herein provided for: *Provided*, That all persons who served in the United States Army, Navy, Marine Corps, or Coast Guard during World War II, the War with Germany, the War with Spain, or in the suppression of the insurrection in the Philippines, and who have been honorably separated or discharged therefrom or placed in the Regular Army or Naval Reserve, shall have the exclusive preference right for a period of three months to enter said lands, subject, however, to the provisions of subsection (c) of section 4 of the Act of December 5, 1924 (43 Stat. 672, 702; 43 U.S.C., sec. 433); and also, so far as practicable, preference shall be given to said persons in all construction work authorized by this subchapter: *Provided further*, That the above exclusive preference rights shall apply to veteran settlers on lands watered from the Gila canal in Arizona the same as to veteran settlers on lands watered from the All-American canal in California: *Provided further*, That in the event such an entry shall be relinquished at any time prior to actual residence upon the land by the entryman for not less than one year, lands so relinquished shall not be subject to entry for a period of sixty days after the filing and notation of the relinquishment in the local land office, and after the expiration of said sixty-day period such lands shall be open to entry, subject to the preferences in this section provided. (45 Stat. 1063; Act of March 6, 1946, 60 Stat. 36; Act of October 21, 1976, § 704, 90 Stat. 2792; 43 U.S.C. § 617h)

EXPLANATORY NOTE

1976 Amendment. Section 704 of the Federal Land Policy and Management Act of 1976 (Act of October 21, 1976, Public Law 94–579, 90 Stat. 2792) amended section 9 by deleting "All lands of the United States found by the Secretary of the Interior to be practicable of irrigation and reclamation by the irrigation works authorized herein shall be withdrawn from public entry. Thereafter, at the direction of the Secretary of the Interior, such lands" and inserting in lieu thereof "Lands found to be practicable of irrigation and reclamation by irrigation works and withdrawn under the Act of March 6, 1946 (43 U.S.C. 617(h))". Extracts from the 1976 Act, including section 704, appear in Volume IV in chronological order.

Pages 438-439

Sec. 14. [This act is a supplement to the reclamation law.]—

* * * * *

NOTES OF OPINIONS

Excess lands	**2**
Residency	**4**

2. Excess lands

[Editor's Note: See notes under section 1.]

4. Residency

The residency requirement of section 5 of the Reclamation Act is made applicable, by section 14 of the Boulder Canyon Project Act, to deliveries of Boulder Canyon Project water to lands in the Imperial Valley. This requirement continues in perpetuity until Congress changes the reclamation law by appropriate statutory enactment. *Yellen v. Hickel*, 352 F. Supp. 1300 (S.D. Cal. 1972), vacated for lack of standing to sue, *United States v. Imperial Irrigation District*, 559 F.2d 509, 516-20 (1977).

Page 440

Sec. 17. [Claims of the United States arising from any contract authorized by this act]—Except as provided in title 11 [of the U.S. Code], claims of the United States arising out of any contract authorized by this act shall have priority over all others, secured or unsecured. (45 Stat. 1065; Act of November 6, 1978, § 332, 92 Stat. 2679; 43 U.S.C. § 617p)

EXPLANATORY NOTE

1978 Amendment. Section 332 of the Act of November 6, 1978 (Public Law 95-598, 92 Stat. 2679) amended section 17 by inserting the introductory phrase "Except as provided in title 11". Title 11 of the U.S. Code contains the bankruptcy laws of the United States, as generally revised by the 1978 Act. The 1978 Act does not appear herein.

INTERIOR DEPARTMENT APPROPRIATION ACT, 1932

Page 484

[Giving information and advice to settlers.]—

* * * * *

Explanatory Note

Provision Repeated. The same reference to the Interior Department Appropriation Act, 1945, is contained in each subsequent annual appropriation act through the most recent one reviewed for this publication, the Energy and Water Development Appropriation Act, 1982 (95 Stat. 1140), which was continued for fiscal year 1983 by section 101(f) of the Further Continuing Appropriations Act for Fiscal Year 1983 (96 Stat. 1906).

INTERIOR DEPARTMENT APPROPRIATION ACT, 1933

Pages 496-497

[Contribution to cost of investigations requested by non-Federal interests.]—

* * * * *

Explanatory Note

Provision Repeated. A similar provision is contained in each subsequent annual appropriation act through the Act of September 25, 1979 (93 Stat. 444).

VACATION OF WITHDRAWALS OF PUBLIC LANDS CONTAINING MINERALS

Pages 498-499

Sec. 1. Conditional restoration of lands to mineral entry.]—

* * * * *

NOTE OF OPINION

1. Application

Notwithstanding Associate Solicitor Fisher Opinion, M–36433 (April 12, 1957) which suggests that the Bureau of Reclamation has abolished the distinction in section 3 of the Reclamation Act between withdrawn lands required for irrigation works (first form withdrawals) as opposed to withdrawn lands which are merely susceptible of irrigation (second form withdrawals), nothing in the Act of April 23, 1932 implies that lands withdrawn under second form withdrawals have been closed to mineral location. As the 1932 Act specifically refers only to public lands "withdrawn for possible use for construction purposes" it affects only first form withdrawals. Comparison with other statutes (in particular, section 9 of the Boulder Canyon Project Act) demonstrates that when Congress intended legislation to cover lands to be irrigated from a project, as distinct from those to be used for irrigation works, it made its intention perfectly clear in very plain language. *M.G. Johnson*, IBLA 70–14, 78 I.D. 107 (April 5, 1971).

LEAVITT ACT

Pages 504-505

[Indians—Adjustment or elimination of reimbursable debts—Deferment of irrigation construction charges—Report to Congress—Approval of Congress.]—The Secretary of the Interior is hereby authorized and directed to adjust or eliminate reimbursable charges of the Government of the United States existing as debts against individual Indians or tribes of Indians in such a way as shall be equitable and just in consideration of all the circumstances under which such charges were made: *Provided*, That the collection of all construction costs against any Indian owned lands within any Government irrigation project is hereby deferred, and no assessments shall be made on behalf of such charges against such lands until the Indian title thereto shall have been extinguished, and any construction assessments heretofore levied against such lands in accordance with the provisions of the Act of February 14, 1920 (41 Stat. L. 409), and uncollected, are hereby canceled: *Provided further*, That the secretary shall report such adjustments and eliminations to the Congress not later than sixty calendar days following the end of the fiscal year in which they are made: *Provided further*, That any proceedings hereunder shall not be effective until approved by Congress unless Congress shall have failed to act favorably or unfavorably thereon by concurrent resolution within ninety calendar days after the filing of said report, in which case they shall become effective at the termination of the said ninety calendar days. (47 Stat. 564; Act of December 21, 1982, 96 Stat. 1824; 25 U.S.C. § 386a)

Explanatory Note

1982 Amendment. Section 208(a) of the Congressional Reports Elimination Act of 1982 (Act of December 21, 1982, Public Law 97-375, 96 Stat. 1819, 1824) amended the second and third provisos of the Leavitt Act to read as they appear above. Prior to their amendment, the second proviso required reports to be made to Congress annually, on the first Monday in December, showing adjustments made during the preceding fiscal year, and the third proviso provided that proceedings under the Act would not be effective until approved by Congress unless Congress fails to act within sixty legislative, rather than ninety calendar, days after filing of the report. For legislative history of the 1982 Act see H.R. 6005 in the 97th Congress, reported in House from Government Operations September 14, 1982, H.R. Rept. No. 97-804. Passed House September 20, 1982; passed Senate December 8, 1982. Extracts from the 1982 Act, including section 208(a), appear in volume IV in chronological order.

Notes of Opinions

Application 1
Cancellation of charges 2

1. Application

The phrase "Indian owned lands," as employed in the first proviso of the Leavitt Act, refers only to (1) trust or restricted lands, the Indian title to which has not been extinguished by conveyance, after June 30, 1932, to a non-Indian, or (2) trust or restricted lands purchased for Indians on or after July 1,

1932. Thus, where the non-Indian owner of land within the Wind River irrigation project, who is obligated to pay all irrigation charges assessed against the land under a repayment contract which runs with the land, conveys such land in fee simple to an enrolled Shoshone Indian, the first proviso of the Act does not require the deferral of irrigation or any other construction charges against the land. However, as the application of the first clause of the Act is not limited to "Indian owned lands," it authorizes the cancellation or adjustment of construction or any other reimbursable charges against the land so purchased as long as the charges are debts owed to the United States by the Indian purchaser. Deputy Solicitor Weinberg Opinion, M–36708 (July 18, 1967), in re construction charges, Indian-owned lands—Wind River irrigation project, Wyoming.

The adjustment of charges under the first clause of the Leavitt Act applies only to trust or restricted Indian lands and does not apply to fee patented Indian lands, which are treated the same as non-Indian lands. Associate Solicitor Allan Opinion, M–36711, July 18, 1967, in re proposed contract with the LeClair-Riverton Irrigation District.

2. Cancellation of charges

Reimbursable irrigation construction costs against Indian-owned lands for amounts spent both before and after the enactment of the Leavitt Act which, pursuant to the Act, have been listed for cancellation, reported to Congress and not disapproved by Congress, have been effectively cancelled by the Act. Simply because the collection of such charges may have been deferred by the first provision of the Act does not change the fact that the charges became accrued debts owing to the United States as soon as the amounts were spent. That portion of the Deputy Solicitor's memorandum to the Deputy Commissioner of Indian Affairs, May 11, 1960, which held that submission of such charges to Congress did not result in their cancellation because no irrigation construction costs were presently existing as debts due the United States by virtue of their deferral by the first provision of the Act, is hereby overruled. Deputy Solicitor Weinberg Opinion, M–36708 (July 18, 1967), in re construction charges, Indian-owned lands—Wind River irrigation project, Wyoming.

GENERAL AUTHORITY, INTERNATIONAL BOUNDARY COMMISSION

Page 523

"Sec. 4. [Acceptance, acquisition and withdrawal of lands.]—

* * * * *

EXPLANATORY NOTE

Partial Repeal. Section 704(a) of the Federal Land Policy and Management Act (Act of October 21, 1976, Public Law 94–579, 90 Stat. 2792) repealed all of clause (c) except the proviso thereof. However, such repeal is not to be construed as terminating any valid lease, permit, patent, etc. existing on the October 21, 1976, the effective data of the Act (see 43 U.S.C. § 1701 nt). Extracts from the 1976 Act, including section 704(a), appear in Volume IV in chronological order.

FEDERAL POWER ACT

Pages 527-528

Part II—Regulation of Electric —Utility Companies Engaged in Interstate Commerce

DECLARATION OF POLICY, APPLICATION OF PART, DEFINITIONS

Sec. 201.(a) [Federal regulation of transmission and sale of electric energy.]—It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) [Use or sale of electric energy in interstate commerce.]—(1) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(2) The provisions of sections 210, 211, and 212 shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this Act with respect to such provisions. Compliance with any order of the Commission under the provisions of section 210 or 211, shall not make an electric utility or other entity subject to the jurisdiction of the Commission for any purposes other than the purposes specified in the preceeding sentence.

(c) [Electric energy in interstate commerce.]—For the purpose of this Part, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) ["Sale of electric energy at wholesale" defined.]—The term "sale of electric energy at wholesale" when used in this Part means a sale of electric energy to any person for resale.

(e) ["Public utility" defined.]—The term "public utility" when used in this Part or in the Part next following means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part (other than facilities subject to such jurisdiction solely by reason of section 210, 211, or 212).

(f) [United States, State, political subdivision of a State, or agency or instrumentality thereof exempt.]—No provision in this Part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto. (49 Stat. 847; Act of November 9, 1978, § 204(b), 92 Stat. 3140; 16 U.S.C. § 824)

Explanatory Note

1978 Amendment. Section 204(b) of the Public Utility Regulatory Policies Act of 1978 (Act of November 9, 1978, Public Law 95-617, 92 Stat. 3117, 3140) amended section 201 by (1) designating the existing provisions of subsection (b) as paragraph (1) and, in paragraph (1) as so designated, inserting "except as provided in paragraph (2)" following "in interstate commerce, but", (2) adding paragraph (2) to subsection (b), and (3) inserting in subsection (e) "(other than facilities subject to such jurisdiction solely by reason of section 210, 211 or 212)" following "under this Part". Extracts from the 1978 Act, not including section 204(b), appear in Volume IV in chronological order.

Pages 528-530

INTERCONNECTION AND COORDINATION OF FACILITIES; EMERGENCIES; TRANSMISSION TO FOREIGN COUNTRIES

Sec. 202.

* * * * *

(g) Continuance of service—In order to insure continuity of service to customers of public utilities, the Commission shall require, by rule, each public utility to—

(1) report promptly to the Commission and any appropriate State regulatory authorities any anticipated shortage of electric energy or capacity which would affect such utility's capability of serving its wholesale customers,

(2) submit to the Commission, and to any appropriate State regulatory authority, and periodically revise, contingency plans respecting—

(A) shortages of electric energy or capacity, and

(B) circumstances which may result in such shortages, and

(3) accommodate any such shortages or circumstances in a manner which shall—

(A) give due consideration to the public health, safety, and welfare, and

(B) provide that all persons served directly or indirectly by such public utility will be treated, without undue prejudice or disadvantage. (49 Stat. 848; Act of August 7, 1953, 67 Stat. 461; § 206(a), Act of November 9, 1978, 92 Stat. 3141; 16 U.S.C. § 824a)

EXPLANATORY NOTE

1978 Amendment. Section 206(a) of the Public Utility Regulatory Policies Act of 1978 (Act of November 9, 1978, Public Law 95-617, 92 Stat. 3141) amended Section 202 by adding subsection (g) as it appears above. Extracts from the 1978 Act, not including section 206(a), appear in Volume IV in chronological order.

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CERTAIN INTERCONNECTION AUTHORITY

Sec. 210. (a)(1) Upon application of any electric utility, Federal power marketing agency, geothermal power producer (including a producer which is not an electric utility), qualifying cogenerator, or qualifying small power producer, the Commission may issue an order requiring—

(A) the physical connection of any cogeneration facility, any small power production facility, or the transmission facility, any electric utility, with the facilities of such applicant.

(B) such action as may be necessary to make effective any physical connection described in subparagraph (A), which physical connection is ineffective for any reason, such as inadequate size, poor maintenance, or physical unreliability,

(C) such sale or exchange of electric energy or other coordination, as may be necessary to carry out the purposes of any order under subparagraph (A) or (B), or

(D) such increase in transmission capacity as may be necessary to carry out the purposes of any order under subparagraph (A) or (B).

(2) Any State regulatory authority may apply to the Commission for an order for any action referred to in subparagraph (A), (B), (C), or (D) of paragraph (1). No such order may be issued by the Commission with respect to a Federal power marketing agency upon application of a State regulatory authority.

(b) Upon receipt of an application under subsection (a), the Commission shall—

(1) issue notice to each affected State regulatory authority, each affected electric utility, each affected Federal power marketing agency, each affected owner or operator of a cogeneration facility or of a small power production facility, and to the public,

(2) afford an opportunity for an evidentiary hearing, and

(3) make a determination with respect to the matters referred to in subsection (c).

No order may be issued by the Commission under subsection (a) unless the Commission determines that such order—

(1) is in the public interest,

(2) would—

(A) encourage overall conservation of energy or capital,

(B) optimize the efficiency of use of facilities and resources, or

(C) improve the reliability of any electric utility system or Federal power marketing agency to which the order applies, and

(3) meets the requirements of section 212.

(d) The Commission may, on its own motion, after compliance with the requirements of paragraphs (1) and (2) of subsection (b), issue an order requiring any action described in subsection (a)(1) if the Commission determines that such order meets the requirements of subsection (c). No such order may be issued upon the Commission's own motion with respect to a Federal power marketing agency.

(e) (1) As used in this section, the term "facilities" means only facilities used for the generation or transmission of electric energy.

(2) With respect to an order issued pursuant to an application of a qualifying cogenerator or qualifying small power producer under subsection (a)(1), the term "facilities of such applicant" means the qualifying cogeneration facilities or qualifying small power production facilities of the applicant, as specified in the application. With respect to an order issued pursuant to an application under subsection (a)(2), the term "facilities of such applicant" means the qualifying cogeneration facilities, qualifying small power production facilities, or the transmission facilities of an electric utility, as specified in the application. With respect to an order issued by the Commission on its own motion under subsection (d), such term means the qualifying cogeneration facilities, qualifying small power production facilities, or the transmission facilities of an electric utility, as specified in the proposed order. (§ 202, Act of November 9, 1978, 92 Stat. 3135; § 643(a)(2), Act of June 30, 1980, 94 Stat. 770; 16 U.S.C. § 24i)

Explanatory Notes

1980 Amendment. Section 643(a)(2) of the Act of June 30, 1980 (Public Law 96-294, 94 Stat. 770) amended subsection 210(a)(1) by adding the reference to an application of a geothermal power producer. The 1980 Act does not appear herein.

1978 Addition. Section 202 of the Public Utility Regulatory Policies Act of 1978 (Act of November 9, 1978, Public Law 95-617, 92 Stat. 3117, 3135) amended part II of the Federal Power Act by adding section 210. Extracts from the 1978 Act, not including section 202, appear in Volume IV in chronological order.

CERTAIN WHEELING AUTHORITY

Sec. 211 (a) Any electric utility, geothermal power producer (including a producer which is not an electric utility), or Federal power marketing agency may apply to the Commission for an order under this subsection requiring any other electric utility to provide transmission services to the applicant (including any enlargement of transmission capacity necessary to provide such services). Upon receipt of such application, after public notice and notice to each affected State regulatory authority, each affected electric utility, and each affected Federal power marketing agency, and after affording an opportunity for an evidentiary hearing, the Commission may issue such order if it finds that such order—

(1) is in the public interest,

(2) would—

(A) conserve a significant amount of energy,

(B) significantly promote the efficient use of facilities and resources, or

(C) improve the reliability of any electric utility system to which the order applies, and

(3) meets the requirements of section 212.

Any electric utility, or Federal power marketing agency, which purchases electric energy for resale from any other electric utility may apply to the Commission for an order under this subsection requiring such other electric utility to provide transmission services to the applicant (including any increase in transmission capacity necessary to provide such services). Upon receipt of an application under this subsection, after public notice and notice to each affected State regulatory authority, each affected electric utility, and each affected Federal power marketing agency, and after affording an opportunity for an evidentiary hearing, the Commission may issue such an order if the Commission determines that–

(1) such other electric utility has given actual or constructive notice that it is unwilling or unable to provide electric service to the applicant and has been requested by the applicant to provide the transmission services requested in the application under this subsection, and

(2) such order meets the requirements of section 212.

(c)(1) No order may be issued under subsection (a) unless the Commission determines that such order would reasonably preserve existing competitive relationships.

(2) No order may be issued under subsection (a) or (b) which requires the electric utility subject to the order to transmit, during any period, an amount of electric energy which replaces any amount of electric energy—

(A) required to be provided to such applicant pursuant to a contract during such period, or

(B) currently provided to the applicant by the utility subject to the order pursuant to a rate schedule on file during such period with the Commission.

(3) No order may be issued under the authority of subsection (a) or (b) which is inconsistent with any State law which governs the retail marketing areas of electric utilities.

(4) No order may be issued under subsection (a) or (b) which provides for the transmission of electric energy directly to an ultimate consumer.

(d)(1) Any electric utility ordered under subsection (a) or (b) to provide transmission services may apply to the Commission for an order permitting such electric utility to cease providing all, or any portion of, such services. After public notice, notice to each affected State regulatory authority, each affected Federal power marketing agency, and each affected electric utility, and after an opportunity for an evidentiary hearing, the Commission shall issue an order terminating or modifying the order issued under subsection (a) or (b), if the electric utility providing such transmission services has demonstrated, and the Commission has found, that—

(A) due to changed circumstances, the requirements applicable, under this section and section 212, to the issuance of an order under subsection (a) or (b) are no longer met, or

(B) any transmission capacity of the utility providing transmission services under such order which was, at the time such order was issued, in excess of the capacity necessary to serve its own customers is no longer in excess of the capacity necessary for such purposes.

No order shall be issued under this subsection pursuant to a finding under subparagraph (A) unless the Commission finds that such order is in the public interest.

(2) Any order issued under this subsection terminating or modifying an order issued under subsection (a) or (b) shall—

(A) provide for any appropriate compensation, and

(B) provide the affected electric utilities adequate opportunity and time to—

(i) make suitable alternative arrangements for any transmission services terminated or modified, and

(ii) insure that the interests of ratepayers of such utilities are adequately protected.

(3) No order may be issued under this subsection terminating or modifying any order issued under subsection (a) or (b) if the order under subsection (a) or (b) includes terms and conditions agreed upon by the parties which—

(A) fix a period during which transmission services are to be provided under the order under subsection (a) or (b), or

(B) otherwise provide procedures or methods for terminating or modifying such order (including, if appropriate, the return of the transmission capacity when necessary to take into account an increase, after the issuance of such order, in the needs of the electric utility subject to such order for transmission capacity).

(e) As used in this section, the term "facilities" means only facilities used for the generation or transmission of electric energy. (§ 203, Act of November 9, 1978, 92 Stat. 3137; § 643 (a)(3), Act of June 30, 1980, 94 Stat. 770; 16 U.S.C. § 824j)

EXPLANATORY NOTES

1980 Amendment. Section 643 (a)(3) of the Act of June 30, 1980 (Public Law 96-294, 94 Stat. 770) amended subsection 211(a) by adding the reference to an application of a geothermal power producer. The 1980 Act does not appear herein.

1978 Addition. Section 203 of the Public Utility Regulatory Policies Act of 1978 (Act of November 9, 1978, Public Law 95-617, 92 Stat. 3117, 3137) amended part II of the Federal Power Act by adding section 211. Extracts from the 1978 Act, not including section 203, appear in Volume IV in chronological order.

PROVISIONS REGARDING CERTAIN ORDERS REQUIRING INTERCONNECTION OR WHEELING

Sec. 212. (a) No order may be issued by the Commission under section 210 or subsection (a) or (b) of section 211 unless the Commission determines that such order—

(1) is not likely to result in a reasonably ascertainable uncompensated economic loss for any electric utility, qualifying cogenerator, or qualifying small power producer, as the case may be, affected by the order;

(2) will not place an undue burden on an electric utility, qualifying cogenerator, or qualifying small power producer, as the case may be, affected by the order;

(3) will not unreasonably impair the reliability of any electric utility affected by the order; and

(4) will not impair the ability of any electric utility affected by the order to render adequate service to its customers.

The determination under paragraph (1) shall be based upon a showing of the parties. The Commission shall have no authority under section 210 or 211 to compel the enlargement of generating facilities.

(b) No order may be issued under section 210 or subsection (a) or (b) of section 211 unless the applicant for such order demonstrates that he is ready, willing, and able to reimburse the party subject to such order for—

(1) in the case of an order under section 210, such party's share of the reasonably anticipated costs incurred under such order, and

(2) in the case of an order under subsection (a) or (b) of section 211—

(A) the reasonable costs of transmission services, including the costs of any enlargement of transmission facilities, and

(B) a reasonable rate of return on such costs, as appropriate, as determined by the Commission.

(c)(1) Before issuing an order under section 210 or subsection (a) or (b) of section 211, the Commission shall issue a proposed order and set a reasonable time for parties to the proposed interconnection or transmission order to agree to terms and conditions under which such order is to be carried out, including the apportionment of costs between them and the compensation or reimbursement reasonably due to any of them. Such proposed order shall not be reviewable or enforceable in any court. The time set for such parties to agree to such terms and conditions may be shortened if the Commission determines that delay would jeopardize the attainment of the purposes of any proposed order. Any terms and conditions agreed to by the parties shall be subject to the approval of the Commission.

(2)(A) If the parties agree as provided in paragraph (1) within the time set by the Commission and the Commission approves such agreement, the terms and conditions shall be included in the final order. In the case of an order under section 210, if the parties fail to agree within the time set by the Commission or if the Commission does not approve any such agreement, the Commission shall prescribe such terms and conditions and include such terms and conditions in the final order.

(B) In the case of any order applied for under section 211, if the parties fail to agree within the time set by the Commission, the Commission shall prescribe such terms and conditions in the final order.

(d) If the Commission does not issue any order applied for under section 210 or 211, the Commission shall, by order, deny such application and state the reasons for such denial.

(e) No provision of section 210 or 211 shall be treated—

(1) as requiring any person to utilize the authority of such section 210 or 211 in lieu of any other authority of law, or

(2) as limiting, impairing, or otherwise affecting any authority of the Commission under any other provision of law.

(f)(1) No order under section 210 or 211 requiring the Tennessee Valley Authority (hereinafter in this subsection referred to as the "TVA") to take any action shall take effect for 60 days following the date of issuance of the order. Within 60 days following the issuance by the Commission of any order under section 210 or of section 211 requiring the TVA to enter into any contract for the sale or delivery of power, the Commission may on its own motion initiate, or upon petition of any aggrieved person shall initiate, an evidentiary hearing to determine whether or not such sale or delivery would result in violation of the third sentance of section 15d(a) of the Tennessee Valley Authority Act of 1933 (16 U.S.C. 831n-4), hereinafter in this subsection referred to as the TVA Act.

(2) Upon initiation of any evidentiary hearing under paragraph (1), the Commission shall give notice thereof to any applicant who applied for and obtained the order from the Commission, to any electric utility or other entity subject to such order, and to the public, and shall promptly make the determination referred to in paragraph (1). Upon initiation of such hearing, the Commission shall stay the effectiveness of the order under section 210 or 211 until whichever of the following dates is applicable—

(a) the date on which there is a final determination (including any judicial review thereof under paragraph (3)) that no such violation would result from such order, or

(B) the date on which a specific authorization of the Congress (within the meaning of the third sentence of section 15d(a) of the TVA Act) takes effect.

(3) Any determination under paragraph(1) shall be reviewable only in the appropriate court of the United States upon petition filed by any aggrieved person or municipality within 60 days after such determination, and such court shall have jurisdiction to grant appropriate relief. Any applicant who applied for and obtained the order under section 210 or 211, and any electric utility or other entity subject to such order shall have the right to intervene in any such proceeding in such court. Except for review by such court (and any appeal or other review by an appellate court of the United States), no court shall have jurisdiction to consider any action brought by any person to enjoin the carrying out of any order of the Commission under section 210 or section 211 requiring the TVA to take any action on the grounds that such action requires a specific authorization of the Congress

pursuant to the third sentence of seciton 15d(a) of the TVA Act. (§ 204(a), Act of November 9, 1978, 92 Stat. 3138; 16 U.S.C. § 824k)

EXPLANATORY NOTE

1978 Addition. Section 204(a) of the Public Utility Regulatory Policies Act of 1978 (Act of November 9, 1978, Public Law 95-617, 92 Stat. 3138) amended part II of the Federal Power Act by adding section 212. Extracts from the 1978 Act, not including section 204, appear in Volume IV in chronological order.

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PART III—LICENSEES AND PUBLIC UTILITIES; PROCEDURAL AND ADMINISTRATIVE PROVISIONS

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Page 532

Sec. 303. [Requirements applicable to agencies of the United States.]—

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NOTE OF OPINION

1. Federal agency accounts

The Federal Power Commission has both the power and the duty to act affirmatively to determine whether the Bureau of Reclamation's power records and accounts are in compliance with the Commission's Uniform System of Accounts. The FPC may have access to Bureau records for this purpose. Dec. Comp. Gen. B-125042 (letter to Chairman Reuss, Conservation and Natural Resources Subcommittee, August 22, 1974).

RIO GRANDE CANALIZATION PROJECT

Pages 543-544

* * * * *

Sec. 2. [$4,500,000 authorized to be appropriated—Appropriation may be transferred for direct expenditure to Department of Interior.]—There is authorized to be appropriated the sum of $4,500,000 for the purposes of carrying out the provisions of section 1 hereof, other than for operation and maintenance, including salaries and wages, fees for professional services; rents; travel expenses; per diem in lieu of actual subsistence; printing and binding, law books, and books of reference: *Provided*, That the amount herein authorized to be appropriated shall include so much as may be necessary for completion of construction of the diversion dam in the Rio Grande wholly in the United States, in addition to the $1,000,000 authorized to be appropriated for this purpose by the Act of August 29, 1935 (49 Stat. 961): *Provided further*, That the total cost of construction of said diversion dam and canalization works shall not exceed $5,500,000: *Provided further*, That the provisions of section 3709 of the Revised Statutes (U.S.C., title 41, sec. 5) shall not apply to any purchase made or service procured when the aggregate amount involved is $100 or less; purchase, exchange, maintenance, repair and operation of motor-propelled passenger- and freight-carrying vehicles; hire with or without personal services, of work animals and animal-drawn and motor-propelled vehicles and equipment; acquisition by donation, condemnation, or purchase of real and personal property; transportation (including drayage) of personal effects of employees upon change of station; telephone, telegraphic, and airmail communication; rubber boots for official use by employees; ice; equipment, service, supplies, and materials and other such miscellaneous expenses as the Secretary of State may deem necessary properly to carry out the provisions of the Act: *And Provided further*, That any part of any appropriation made hereunder may be transferred to, for direct expenditure by, the Department of the Interior pursuant to such arrangements therefor as may be from time to time effected between the Secretary of State and the Secretary of the Interior, or as directed by the President of the United States. (49 Stat. 1463; Act of November 29, 1975, § 206, 18 Stat. 763)

EXPLANATORY NOTE

1975 Amendment. Section 206 of the Act of November 29, 1975 (Public Law 94-141, 89 Stat. 763) amended section 2 by substituting "$4,500,000" for "$3,000,000" and "$5,500,000" for "$4,000,000". The 1975 Act does not appear herein.

FLOOD CONTROL ACT OF 1936

Pages 546-547

Sec. 3. [Responsibility of State to share costs of flood control.]—

* * * * *

NOTE OF OPINION

1. Nonreservoir projects

The exception in section 6(e) of the Federal Water Project Recreation Act which states that section 2 of that Act shall not apply to nonreservoir flood control projects may be interpreted to also cover nonreservoir "local protection" projects. Consequently, for the purpose of planning local participation in recreation and fish and wildlife enhancement in connection with nonreservoir "local protection" projects, section 2(a) of that Act cannot be applied to nonreservoir projects authorized under section 3 of the Flood Control Act of 1936. Memorandum of Acting Associate Solicitor Davis to Regional Solicitor, Portland, September 11, 1969.

INTERIOR DEPARTMENT APPROPRIATION ACT, 1938

Page 565

[Colorado-Big Thompson project—Repayment contracts.]—

* * * * *

NOTE OF OPINION

3. Environmental impact statements

No environmental impact statement was required prior to the signing of a contract between the Northern Colorado Water Conservancy District and Municipal Subdistrict and the United States which provided that the surplus capacity of the Colorado-Big Thompson project could be used to carry water from the Western slope to the Eastern slope of Colorado if the Subdistrict could obtain the necessary water rights, and which further provided that no water should be transported until the final environmental statement had been approved because: (1) the contract does not constitute a recommendation or report on a major Federal action but rather is merely an agreement which precipitated the planning for the diversion of water which the Subdistrict has yet to obtain; (2) the contract expressly recognizes that an environmental impact statement must be prepared and approved and the agency cannot recommend the proposal until the statement has been approved; and (3) in a practical sense,it would be overly burdensome to require the agency to prepare an environmental impact statement before the plans for the proposal are prepared. Moreover, until the source of the water to be transferred has been identified it is impossible to definitely determine the overall environmental impacts. *Colorado River Water Conservation District v. United States*, 539 F.2d 907 (10th Cir. 1977).

BONNEVILLE PROJECT

Page 568

[Sec. 1. Completion and operation of dam by Secretary of the Army—Surplus power to be disposed of by Power Administrator.]—

* * * * *

EXPLANATORY NOTE

Change of Name. The "Department of War" and the "Secretary of War" have been known since 1947 as the "Department of the Army" and the "Secretary of the Army," respectively. See section 205(a), (b), Act of July 26, 1947 (61 Stat. 501).

NOTES OF OPINIONS

1. Construction with other laws

The authority of the Secretary of the Interior delegated to the Bonneville Power Administrator to dispose of the output of Federal hydroelectric projects in the Pacific Northwest is derived primarily from the Bonneville Project Act of 1937 and is supplemented by the Reclamation laws (particularly section 9(c) of the Reclamation Project Act of 1939) and section 5 of the Flood Control Act of 1944. All of these Acts have a common purpose and should be read in *pari materia* to ascertain the intent of Congress. Solicitor Melich Opinion, M–36812, 77 I.D. 141 (1970), in re Bonneville Power Administrator's authority to acquire power from the Trojan nuclear power project.

The Bonneville Project Act of 1937, section 9(c) of the Reclamation Project Act of 1939, and section 5 of the Flood Control Act of 1944 all have a common purpose and should be read *in pari materia* to ascertain the intent of Congress. Solicitor Weinberg Opinion, M—36769, 75 I.D. 403 (1968), in re authority of Bonneville Power Administration to participate in the integrated hydro-thermal power program for the Pacific Northwest.

Pages 568-571

Sec. 2. [Administrator appointed by Secretary of Energy—Office of Administrator to be an officer of the Department of Energy—Secretary of the Army to install necessary machinery—Powers and duties of Administrator.]—

* * * * *

EXPLANATORY NOTES

Transfers of Functions. Reorganization Plan No. 3 of 1950 transferred the functions of the Administrator under this Act to the Secretary of the Interior. Section 302(a) of the Department of Energy Organization Act (Act of August 4, 1977, Public Law 95-91, 91 Stat. 578) transferred the functions of the Secretary of the Interior under this Act to the Secretary of Energy and preserved the Bonneville Power Administration as a separate and distinct organizational entity within the Department of Energy. The 1950 Reorganization Plan appears in Volume II at page 1005, and extracts from the 1977 Act, including section 302(a), appear in Volume IV in chronological order.

Supplementary Provision: Transmission System; Revenue Bonds; Self-financing. The Federal Columbia River Transmission System Act (Act of October 18, 1974, Public Law 93-454, 88 Stat. 1376) authorized the establishment of a regional transmission system, the issuance of revenue bonds, and the use of bond proceeds and the revenues of the Bonneville Power Administration to meet its expenses without further appropriation. The 1974 Act appears in Volume IV in chronological order.

Supplementary Provision: Regional Planning; Power Marketing, Conservation, and Resource Acquisition. The Pacific Northwest Electric Power Planning and Conservation Act (Act of December 5, 1980, Public Law 96-501, 94 Stat. 2697) established the four-state Pacific Northwest Electric Power and Conservation Planning Council to carry out regional planning and revised and enlarged the authority of the Administrator of the Bonneville Power Administration to market and conserve power and to acquire power resources. The 1980 Act appears in Volume IV in chronological order.

NOTES OF OPINIONS

Contracting authority 1
Energy conservation 4
Fisheries 5
Purchases of power 6-10
  Centralia coal-plant 6
  Hydro-thermal power program 7

1. Contracting authority

The Administrator of the Bonneville Power Administration is authorized to enter into trust-agency arrangements to purchase power for preference agency customers as part of the proposed Phase 2 of the region's Hydro-thermal Power Program. The contracts are within the broad authority of section 2(f) of the Bonneville Project Act of 1937 and are in furtherance of the purpose of section 5 of the Flood Control Act of 1944 to promote the most widespread use of Federal power at the lowest possible rate to consumers consistent with sound business principles, the authority given the Administration in section 2(b) of the 1937 Act to interchange energy, and the directive of section 6 of the 1937 Act to encourage the equitable distribution of Federal energy. Dec. Comp. Gen. B-137458 (September 13, 1974).

4. Energy conservation

The Bonneville Administrator is authorized to engage in energy conservation measures if he determines they are a reasonable means of attaining some end necessary or appropriate to fulfilling the responsibilities imposed on him by law. Dec. Comp. Gen. B–114858 (July 10, 1979).

5. Fisheries

The Bonneville Power Administrator has authority to undertake or fund a study or project to help restore the Columbia River anadromous fishery if he finds that such a study or project is necessary or appropriate to carry out his power marketing responsibilities under the Bonneville Project Act and other related statutes. Acting Regional Solicitor Halvorson Opinion, M–36885, 83 I.D. 589 (1976).

6. Purchases of power—Centralia coal-plant

The purchase of power from the Centralia coal-plant to enable the Bureau of Reclamation to more fully utilize the hydro capability of the Central Valley Project to meet its growing project and customer loads, and to enable the Bonneville Power Administration to overcome a deficiency in firm power during a three-year period, is well within the statutory authority of the Secretary of the Interior under the Bonneville Project Act of 1937, the Reclamation Laws, particularly section 9(c) of the Reclamation Project Act of 1939, and section 5 of the Flood Control Act of 1944. Memorandum of Assistant Solicitor Pelz, January 2, 1968.

7.—Hydro-thermal power program

The Bonneville Power Administrator has authority to enter into firm, long-term agreements with preference customer participants in the Trojan project and in other projects in the hydro-thermal power program under which the Bonneville Power Administration takes the participants' share of project output and agrees to pay the participants under net billing arrangements for their share of project costs from a date certain whether or not the project is operable. The contracts are supported by the Administrator's authority to operate Federal hydroelectric projects for the "benefit of the general public," to "encourage the widest possible diversified use of electric energy," and to "encourage the most widespread use" of Federal power "at the lowest possible rates" to consumers. The 10-year hydro-thermal power program which the contracts implement was specifically approved by Congress in the Public Works Appropriation Act for fiscal year 1970. Solicitor Melich Opinion, M-36812, 77 I.D. 141 (1970).

In implementing an integrated hydro-thermal power program for the Pacific Northwest, the Bonneville Power Administrator may enter into contractual arrangements, including the acquisition by purchase or exchange of thermal power, which are reasonably related to the statutory objective of providing the most widespread use of and benefit from the existing and authorized Federal power investment at the lowest practical cost. Solicitor Weinberg Opinion, M-36769, 75 I.D. 403 (1968).

The authority of the Department of the Interior's power marketing agencies to acquire thermal power and energy by purchase as well as exchange in order more effectively to utilize the Federal hydro capability to serve customers' requirements in accordance with the mandates of the Bonneville Project Act of 1937, section 9(c) of the Reclamation Project Act of 1939, and section 5 of the Flood Control Act of 1944, is well established. Solicitor Weinberg Opinion, M-36769, 75 I.D. 403 (1968), in re authority of the Bonneville Power Administration to participate in the integrated hydro-thermal power program for the Pacific Northwest. *Accord*, Solicitor Melich Opinion, M-36812, 77 I.D. 141 (1970).

Pages 571-572

Sec. 4. [Preference to public bodies and cooperatives.]—

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NOTES OF OPINIONS

Preference provision 1
Public benefits 2

1. Preference provision

A municipality which does not have a municipal utility operation and has not made any commitments to obtain one does not qualify as a preference customer for the purpose of seeking an option to purchase Federal power. *City of Portland, Oregon v. Munro*, No. 77-928, D. Oregon (December 3, 1980).

2. Public benefits

The Bonneville Power Administrator has authority to enter into firm, long-term agreements with preference customer participants in the Trojan project and in other projects in the hydro-thermal power program under which the Bonneville Power Administration takes the participants' share of project output and agrees to pay the participants under net billing arrangements for their share of project costs from a date certain whether or not the project is operable. The contracts are supported by the Administrator's authority to operate Federal hydroelectric projects for the "benefit of the general public," to "encourage the widest possible diversified use of electric energy," and to "encourage the most widespread use" of Federal power "at the lowest possible rates" to consumers. The 10-year hydro-thermal power program which the contracts implement was specifically approved by Congress in the Public Works Appropriation Act for fiscal year 1970. Solicitor Melich Opinion, M-36812, 77 I.D. 141 (1970).

In implementing an integrated hydro-thermal power program for the Pacific Northwest, the Bonneville Power Administrator may enter into contractual arrangements, including the acquisition by purchase or exchange of thermal power, which are reasonably related to the statutory objective of providing the most widespread use of and benefit from the existing and authorized Federal power investment at the lowest practical cost. Solicitor Weinberg Opinion, M-36769, 75 I.D. 403 (1968).

Pages 572-574

Sec. 5. [Contracts for sale of electric energy.]—

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EXPLANATORY NOTE

Transfer of Functions. See Explanatory Note under section 6, below.

NOTE OF OPINION

1. Exchange agreements

The authority of Interior's power marketing agencies to acquire thermal power and energy by purchase as well as exchange in order more effectively to utilize the Federal hydro capability to serve customers' requirements in accordance with the mandates of the Bonneville Project Act of 1937, section 9(c) of the Reclamation Project Act of 1939, and section 5 of the Flood Control Act of 1944, is well established. Solicitor Weinberg Opinion, M-36769, 75 I.D. 404 (1968), in re authority of the Bonneville Power Administration to participate in the integrated hydro-thermal power program for the Pacific Northwest. *Accord*, Solicitor Melich Opinion, M-36812, 77 I.D. 141 (1970).

Pages 574-575

Sec. 6. [Schedules of rates and charges for electric energy—Preparation and approval—Uniform rates.]—

* * * * *

EXPLANATORY NOTE

Transfers of Functions. Reorganization Plan No. 3 of 1950 transferred the rate preparation function of the Administrator to the Secretary of the Interior. Section 302(a) of the Department of Energy Organization Act (Act of August 4, 1977, Public Law 95-91, 91 Stat. 578) transferred the rate preparation function to the Secretary of Energy, and section 301(b) of that Act also transferred the rate approval function of the Federal Power Commission to the Secretary of Energy. Section 7 of the Pacific Northwest Electric Power Planning and Conservation Act (Act of December 5, 1980, Public Law 96-501, 94 Stat. 2723) superseded these provisions by prescribing the rate preparation duties of the Administrator and providing that rates shall become effective only upon confirmation and approval of the Federal Energy Regulatory Commission. The 1950 Reorganization Plan appears in Volume II at page 1005. Extracts from the 1977 Act, including sections 301(b) and 302(a), appear in Volume IV in chronological order. The 1980 Act appears in Volume IV in chronological order.

NOTES OF OPINIONS

Contracting authority—Hydro-thermal power program 9
Rates and charges 1-8
  Generally 1
  Interim rates 2
  Procedural due process 3
  Rate design 5
  Review and approval 4

1. Rates and charges—Generally

In enacting section 6 of the Bonneville Project Act and patterning section 5 of the Flood Control Act of 1944 after that section, Congress intended that the Federal Power Commission apply its ratemaking expertise partly to protect consumers from undue rate increases instituted by the local power administrators. *United States v. Tex-La Electric Power Cooperative, Inc.*, 693 F.2d 392, 398-400 (5th Cir. 1982).

The Bonneville Project Act and the Flood Control Act of 1944 provide the dual statutory standard, for rates for Federal power, of providing consumers with the benefits of power at the lowest possible price consistent with good business practices as well as protecting the interests of the United States in amortizing its investment in the project within a reasonable period of years. *United States Department of the Interior, Bonneville Power Administration*, 34 F.P.C. 1462, 1465 (1965).

2.—Interim rates

The Federal Power Commission had the power to confirm Bonneville Power Administration rates on an interim basis. The Secretary of Energy inherited these powers through the Department of Energy Organization Act. *Montana Power Company v. Edwards*, 531 F. Supp. 9 (D Ore. 1981).

Under section 5 of the Flood Control Act of 1944 and section 6 of the Bonneville Project Act of 1937 the Federal Power Commission had inherent authority to approve rates for an interim period. *United States v. Tex-La Electric Cooperative, Inc.*, 693 F.2d 392, 408-09 (5th Cir. 1982), reversing *United States v. Tex-La Electric Cooperative, Inc.*, 524 F. Supp. 409 (E.D. La. 1981) and *United States v. Northeast Texas Electric Cooperative, Inc.*, Civil Action No. H–81–604 (S.D. Tex. 1981).

Section 301(b) of the Department of Energy Organization Act, through section 402(a)(2) of the Act, authorizes the Secretary of Energy, in the exercise of the rate approval authority for the Bonneville Power Administration (BPA) formerly in the Federal Power Commission (FPC), to utilize the authority of the FPC under, among others, section 16 of the Natural Gas Act (15 U.S.C. §717o), which authorizes the FPC to perform all acts necessary to carry out its functions. The Supreme Court has held that this includes the authority to set rates on an interim basis. Therefore, the Secretary of Energy has authority to promulgate interim rates for BPA. *Pacific Power & Light Co. v. Duncan*, 499 F. Supp. 672, 678-79 (D. Ore. 1980).

3.—Procedural due process

Where an increase in the wholesale power rates for the Bonneville Power Administration (BPA) was placed into effect by the Assistant Secretary of Energy for Resource Applications pursuant to Delegation Order No. 0204–33, and BPA under its published procedures held 16 public hearings on its proposed rates and 7 more hearings on its revised proposed rates, the BPA customers were afforded all the process due them under the law and the Constitution. *Pacific Power & Light Co. v. Duncan*, 499 F. Supp. 672, 679-81 (D. Ore. 1980).

4.—Review and approval

In plain and unambiguous language, Congress, in section 301(b) of the Department of Energy Organization Act, granted the authority of the Federal Power Commission to approve Bonneville Power Administration rates to the Secretary of Energy, not to the Federal Energy Regulatory Commission. *Pacific Power & Light Co. v. Duncan*, 499 F. Supp. 672, 677-78 (D. Ore. 1980).

It is well within the Secretary of Energy's broad discretion under the Department of Energy Organization Act to delegate to the Assistant Secretary the authority to confirm and approve rates on an interim basis and to delegate or assign to the Federal Energy Regulatory Commission (FERC) the authority to confirm and approve rates on a final basis. Memorandum of General Counsel Coleman, October 14, 1978, in re proposed delegation to FERC of rate confirmation authority for the Department of Energy's power marketing agencies.

Pursuant to Section 301(b) of the Department of Energy Organization Act, the confirmation and approval authority of the Federal Power Commission for Federal power marketing rates is vested in the Secretary of Energy. Memorandum of General Counsel Coleman, October 14, 1978, in re proposed delegation to the Federal Energy Regulatory Commission (FERC) of rate confirmation authority for the Department of Energy's power marketing agencies.

The jurisdiction of the Federal Power Commission under the Bonneville Project Act and section 5 of the Flood Control Act of 1944 to review rates can neither be analogized to an independent rate investigation nor to the appellate function of United States Courts of Appeals over Commission decisions under the Federal Power Act. Congress expected the Commission to apply its independent expertise in evaluating the rates set by the Secretary of the Interior but did not mean that the Commission should supplant the Secretary's responsibility and discretion for initiating appropriate rates nor make a *de novo* determination. *United States Department of the Interior, Bonneville Power Administration*, 34 F.P.C. 1462, 1465 (1965).

5.—Rate design

Because section 6 of the Bonneville Project Act and section 9 of the Federal Columbia River Transmission System Act grant such broad discretion to the Secretary in the design of rates, there is no judicial review of rate design because there is no law to apply. *Pacific Power & Light Co. v. Duncan*, 499 F.2d 672, 681-82 (D. Ore. 1980).

9.—Contracting authority—Hydro-thermal power program

The Bonneville Power Administrator has authority to enter into firm, long-term agreements with preference customer participants in the Trojan project and in other projects in the hydro-thermal power program under which the Bonneville Power Administration takes the participants' share of project output and agrees to pay the participants under net billing arrangements for their share of project costs from a date certain whether or not the project is operable. The contracts are supported by the Administrator's authority to operate Federal hydroelectric projects for the "benefit of the general public," to "encourage the widest possible diversified use of electric energy," and to "encourage the most widespread use" of Federal power "at the lowest possible rates" to consumers. The 10-year hydro-thermal power program which the contracts implement was specifically approved by Congress in the Public Works Appropriation Act for fiscal year 1970. Solicitor Melich Opinion, M-36812, 77 I.D. 141 (1970).

In implementing an integrated hydro-thermal power program for the Pacific Northwest, the Bonneville Power Administrator may enter into contractual arrangements, including the acquisition by purchase or exchange of thermal power, which are reasonably related to the statutory objective of providing the most widespread use of and benefit from the existing and authorized Federal power investment at the lowest practical cost. Solicitor Weinberg Opinion, M-36769, 75 I.D. 403 (1968).

The Administrator of the Bonneville Power Administration is authorized to enter into trust-agency arrangements to purchase power for preference agency customers as part of the proposed Phase 2 of the region's Hydro-thermal Power Program. The contracts are within the broad authority of section 2(f) of the Bonneville Project Act of 1937 and are in furtherance of the purpose of section 5 of the Flood Control Act of 1944 to promote the most widespread use of Federal power at the lowest possible rate to consumers consistent with sound business principles, the authority given the Administration in section 2(b) of the 1937 Act to interchange energy, and the directive of section 6 of the 1937 Act to encourage the equitable distribution of Federal energy. Dec. Comp. Gen. B-137458 (September 13, 1944).

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Sec. 7. [Rate schedules to be based on cost of production of energy—Computation of costs—Allocation of costs.]—

* * * * *

Explanatory Note

Transfer of Function. Section 301(b) of the Department of Energy Organization Act (Act of August 4, 1977, Public Law 95-91, 91 Stat. 578) transferred the cost allocation function of the Federal Power Commission to the Secretary of Energy. Extracts from the 1977 Act, including section 301(b), appear in Volume IV in chronological order.

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1. Repayment

The legislative history of the parenthetical phrase in section 7 of the Bonneville Project Act, that rate schedules shall be drawn to recover costs "upon the basis of the application of such rate schedules to the capacity of the electric facilities" of the project, shows that Congress did not expect regular annual amortization payments to be made. Therefore, the phrase precludes the assessment of an interest or other monetary penalty for failure to meet a scheduled annual payment. Congressional endorsement of the absence of a binding schedule for annual amortization payments was reiterated in the 1966 House Interior Committee report on the third powerhouse at Grand Coulee Dam. Memorandum of Deputy Assistant General Counsel Pelz, November 26, 1982, in re scheduled annual repayment for power investment.

It has long been established that 50 years is a "reasonable period of years" within which to repay the government's investment in power facilities. *United States Department of the Interior, Bonneville Power Administration*, 34 F.P.C. 1462, 1466 (1965).

3. Rates and charges

Neither section 7 of the Bonneville Project Act nor the Public Utility Regulatory Policies Act imposes a cost-of-service standard for the design of wholesale power rates for the Bonneville Power Administration. Although costs must be considered, other factors may be considered as well. *Pacific Power & Light Co. v. Duncan*, 499 F. Supp. 672, 682-83 (D. Ore. 1980).

The Bonneville Project Act and the Flood Control Act of 1944 provide the dual statutory standard, for rates for Federal power, of providing consumers with the benefits of power at the lowest possible price consistent with good business practices as well as protecting the interests of the United States in amortizing its investment in the project within a reasonable period of years. *United States Department of the Interior, Bonneville Power Administration*, 34 F.P.C. 1462, 1465 (1965).

Pages 577-578

Sec. 10. [Appointment of officers and employees—Voluntary and uncompensated services.]—

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NOTES OF OPINIONS

1. Labor relations

Section 10(b) of the Bonneville Project Act vested discretion in the BPA Administrator to bargain collectively as to the wages of BPA employees, but he is not compelled to do so. Consequently, he may reject the arbitrators' recommendation for an 8.53 percent wage increase in a good faith action to comply with the President's directive to maintain a 5.5 percent "cap" on pay increases where the collective bargaining agreement does not make the arbitrators' decision binding. *Columbia Power Trades Council v. United States Department of Energy*, 496 F. Supp. 186 (W.D. Wash. 1980) [Editor's Note: This decision was vacated on the grounds that the Federal Labor Relations Authority, created under Title VII of the Civil Service Reform Act of 1978, has exclusive jurisdiction over Federal labor relations matters. 671 F.2d 325 (9th Cir. 1982).]

Section 10(b) of the Bonneville Project Act, as amended, was not repealed or superseded by the Classification Act of 1949, nor are wage board employees of the Bonneville Power Administration entitled, under the Federal Employees Act of 1966, to payment of 25 percent Sunday premium pay. *Abell v. United States*, 518 F.2d 1369, 207 Ct. Cl. 207 (1975).

Page 578

Sec. 11. [Receipts from transmission and sale of electric energy.]—

* * * * *

EXPLANATORY NOTE

1974 Amendment. Section 11 of the Bonneville Project Act of 1937 was superseded by section 11 of the Federal Columbia River Transmission System Act (Act of Octobe 18, 1974, Public Law 93-454, 88 Stat. 1378) which established in the Treasury of the United States the Bonneville Power Administration Fund consisting of all funds and receipts of the Administrator, including the unexpended balances in the continuing fund established under section 11 of the 1937 Act, and authorized expenditures from the Fund to defray expenses of the Administrator, including emergency expenses and those necessary to insure continuous operation. The 1974 Act appears in Volume IV in chronological order.

CENTRAL VALLEY PROJECT, CALIFORNIA, AND COLORADO RIVER PROJECT, TEXAS

Pages 583-587

Sec. 2. [Central Valley project reauthorized—$12,000,000 authorization transferred to Secretary of Interior as a nonreimbursable expenditure—Otherwise Reclamation law to govern—Priorities.]—

* * * * *

EXPLANATORY NOTE

Supplementary Provision: Central Valley Project Amended To Include Black Butte Project. The Act of October 23, 1970 (Public Law 91-502, 84 Stat. 1097) amended the Central Valley project authorized by section 2 to include the Black Butte project on Stony Creek authorized by the Flood Control Act of 1944 (58 Stat. 887). The 1970 Act requires the Black Butte project to be financially integrated with the Central Valley project and coordinated operationally with the other storage units of the Central Valley project by the Bureau of Reclamation, provided that the Black Butte Dam and Reservoir will be physically operated and maintained by the Corps of Engineers and in a manner compatible with recreational use of the reservoir. The 1970 Act appears in Volume IV in chronological order.

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1. Generally

By pumping water from the Sacramento-San Joaquin Delta to the Delta-Mendota Canal, the Tracy Pumping Plant, Central Valley Project, alters or modifies the condition or capacity of a navigable stream and its operations must, therefore, be presumed to constitute an obstruction to navigable capacity and subject to the requirements of section 10 of the Act of March 3, 1899. But while not an obstruction expressly authorized by Congress, the plant is nonetheless exempt from section 10's requirement that it obtain a permit for its operations, as the basic legislative enactments authorizing the Central Valley Project in 1937, as well as the annual appropriations acts for the operation and maintenance of the projet, when read in light of the history of the broad oversight exercised by Congress over the project, constitute affirmative Congressional authorization for the pumping operations of the Tracy Plant. *Sierra Club v. Andrus*, 610 F.2d 581 (9th Cir. 1979), reversing *Sierra Club v. Morton*, 400 F. Supp. 610 (N.D. Cal. 1975), reversed on other grounds, *California v. Sierra Club*, 451 U.S. 287 (1981).

6. Water—Contracts

The 50-year rolling repayment policy, whereby as each unit of the Central Valley Project is authorized the repayment period for all project contracts entered into under sections 9(c)(2) and 9(e) of the Reclamation Project Act of 1939 is extended for fifty years from the date of the latest authorization, is not inconsistent with the language of those sections authorizing the Secretary to enter into these contracts "for such periods, not to exceed forty years," as this language limits only the length of the contract itself but not the repayment period. Memorandum of Associate Solicitor Little to Commissioner, Water and Power Resources Services, November 26, 1980.

10.—Quality

The Federal Water Pollution Control Act, as amended, does not require the Bureau of

Reclamation to make releases from the Central Valley Project or to refrain from pumping from the Sacramento-San Joaquin Delta in order to maintain State water quality standards for salt water intrusion, as the only State standard imposed on Federal agencies are those with respect to the discharge of pollutants from effluent sources. Those provisions of the act which do apply to salt water intrusion do not purport to affect the operations of Federal agencies. Memorandum of Associate Solicitor Garner to Commissioner of Reclamation, September 15, 1975.

20. Power—Generally

The purchase of power from the Centralia coal-plant to enable the Bureau of Reclamation to more fully utilize the hydro capability of the Central Valley Project to meet its growing project and customer loads, and to enable the Bonneville Power Administration to overcome a deficiency in firm power during a three-year period, is well within the statutory authority of the Secretary of the Interior under the Bonneville Project Act of 1937, the Reclamation laws, particularly section 9(c) of the Reclamation Project Act of 1939, and section 5 of the Flood Control Act of 1944. Memorandum of Assistant Solicitor Pelz, January 2, 1968.

INTERIOR DEPARTMENT APPROPRIATION ACT, 1939

Pages 598-601

[Increase in Reclamation fund—Hayden-O'Mahoney Amendment.]—

* * * * *

NOTES OF OPINIONS

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General 1

1. General

Monies which are received from an irrigation project and covered into the reclamation fund will be credited toward the unmatured construction obligation of the water district but cannot be applied against the operation and maintenance cost of the project unless specifically appropriated by Congress. Memorandum of Acting Associate Solicitor Robison to Field Solicitor Amarillo, November 8, 1972, in re disposition of miscellaneous revenues from Rio Grande Project.

5. Exceptions

The contracts with the Strawberry Water Users' Association providing that revenues from the grazing lands and the Government's investment in the power system are to be credited against project costs are excepted from the application of the Hayden-O'Mahoney Amendment. Solicitor Melich Opinion, M-36863, 79 I.D. 513 (August 8, 1972), in re Strawberry Valley Project, Utah.

The Act of July 1, 1946 not only makes clear that under subsection I of the Fact Finders' Act power revenues are not to be distributed to individual water users after repayment of the construction costs of the project, it also confirms that revenues subject to disposition under subsection I may be applied to project purposes after project repayment instead of being deposited in the General Treasury as would be required by the Hayden-O'Mahoney Act. The same policy would apply to revenues from grazing lands. Solicitor Melich Opinion, M-36863, 79 I.D. 513 (August 8, 1972), in re Strawberry Valley Project, Utah.

COLUMBIA RIVER FISHERY DEVELOPMENT

Pages 602-603

[Sec. 1. **Establishment of salmon cultural stations in Columbia River Basin.]**—The Secretary of Commerce is authorized and directed to establish one or more salmon-cultural stations in the Columbia River Basin in each of the States of Oregon, Washington, and Idaho. Any sums appropriated for the purpose of establishing such stations may be expended, and such stations shall be established, operated, and maintained, in accordance with the provisions of the Act entitled "An Act to provide for a five-year construction and maintenance program for the United States Bureau of Fisheries", approved May 21, 1930, insofar as the provisions of such Act are not inconsistent with the provisions of this Act. (52 Stat. 345; 16 U.S.C. § 755)

Sec. 2. [Investigations, biological surveys, and experiments authorized.]—The Secretary of Commerce is further authorized and directed (1) to conduct such investigations, and such engineering and biological surveys and experiments, as may be necessary to direct and facilitate conservation of the fishery resources of the Columbia River and its tributaries; (2) to construct, install, and maintain devices in the Columbia River Basin for the improvement of feeding and spawning conditions for fish, for the protection of migratory fish from irrigation projects, and for facilitating free migration of fish over obstructions; and (3) to perform all other activities necessary for the conservation of fish in the Columbia River Basin in accordance with law. (52 Stat. 345; 16 U.S.C. § 756)

Sec. 3. [Appropriation.]—There is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $500,000, or so much thereof as may be necessary, to carry out the purposes of this Act. (52 Stat. 345; 16 U.S.C. § 757)

EXPLANATORY NOTE

Transfer of Functions. The Secretary of Commerce was substituted for the Secretary of the Interior in view of the transfer of functions and reorganization effected by Reorganization Plan No. 4 of 1970 (84 Stat. 2090).

FT. PECK PROJECT

Pages 604-609

Explanatory Notes

Change of Name. The "Department of War" and the "Secretary of War" have been known since 1947 as the "Department of the Army" and the "Secretary of the Army," respectively. See section 205(a), (b), Act of July 26, 1947 (61 Stat. 501).

Transfers of Functions. Section 302 (a) of the Department of Energy Organization Act (Act of August 4, 1977, Public Law 95-91, 91 Stat. 578) transferred the functions of the Secretary of the Interior under this Act to the Secretary of Energy, and section 301(b) of the 1977 Act also transferred the function of the Federal Power Commission under this Act to the Secretary of Energy. Extracts from the 1977 Act, including sections 302(a) and 301(b), appear in Volume IV in chronological order.

RIO GRANDE COMPACT

Pages 622-631

* * * * *

NOTE OF OPINION

2. United States as party

In an action by owners of land located within the Elephant Butte Irrigation District but not served by the Rio Grande Project to validate their unauthorized appropriation of water through pumping from the Rio Grande and for damages for failure of the District to serve them, the United States, which owns the dams and irrigation works of the Rio Grande Project and which contracts with the District through the Bureau of Reclamation for the distribution of the water, is, under New Mexico's rule of procedure, an indispensable party. The landowners are asserting claims to water already appropriated to the District. The grant of water rights to them might hinder or disrupt the Rio Grande Project and Compact and interfere with the fulfillment of the Federal government's obligations to deliver water to Mexico under the Convention of May 21, 1906. *Holguin v. Elephant Butte Irrigation District,* 91 N.M. 398, 575 P.2d 88 (1977).

RECLAMATION PROJECT ACT OF 1939

Pages 634-636

Sec. 2. [Definitions of terminology employed.]—

* * * * *

NOTE OF OPINION

3. "Construction charges"

Permanently increasing the height of the Rye Patch Dam by three feet in order to eliminate unsafe twelve inch flashboards, intermittently used to increase reservoir storage capacity, falls within the definition of "rehabilitation and betterment" in the Rehabilitation and Betterment Act of 1949 as such work will increase service to irrigated acres but will not increase the number of acres served by the project. Costs of such work would not be returnable to the United States through "construction charges" defined in section 2(d) of the Reclamation Project Act of 1939. Memorandum of Associate Solicitor Garner, to Assistant Secretary, Land and Water Resources, June 17, 1975, in re proposed contract with the Pershing County Water Conservation District—Humboldt Project, Nevada.

Pages 642-643

Sec. 8.(f) [Classification to be reported to Congress with recommendations for remedial legislation.]—*Deleted.*

* * * * *

Sec. 8.(h) [No modification of obligation without express authority of Congress.]—

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EXPLANATORY NOTE

1975 Amendment: Subsection Deleted. Section 1 (18) of the Act of January 2, 1975 (Public Law 93-608, 88 Stat. 1970) amended section 8 by deleting subsection (f) and redesignating subsections (g), (h), and (i) as (f), (g), and (h), respectively. Extracts from the 1975 Act, including section 1(18), appear in Volume IV in chronological order.

NOTE OF OPINION

1. Reclassification authority

The "express authority" required in subsection 8 (h) (formerly 8 (i)) for a classification or reclassification of lands used to justify a modification of an existing obligation to pay construction charges must be granted by legislation duly enacted by both houses of Congress. A grant of permission by a congressional committee is not sufficient. Memorandum of Associate Solicitor Leshy to Director, O&M Policy Staff, Bureau of Reclamation, May 9, 1979.

Pages 643-646

Sec. 9.(a) [No expenditure for construction until after investigation and report to President and Congress—If proposed construction found

feasible by Secretary and repayable allocations equal estimated cost, construction may be authorized—If allocations do not equal cost, construction may only be undertaken after provision by Congress.]—

* * * * *

NOTE OF OPINION

8. Research and development

The Secretary of the Interior's authority to conduct research and development activity relating to the Reclamation program is implied in the legislation authorizing his program activities and has been expressly recognized by the Congress in subsection O of the Fact Finders' Act (43 U.S.C. § 377), which provides that the cost and expense of general investigations authorized by the Secretary shall be nonreimbursable. Memorandum of Associate Solicitor Hogan, April 14, 1967, in re authority to undertake research and development in high-voltage underground transmission.

Pages 647-651

Sec. 9.(c) [Sales or leases of water or power—Appropriate share of cost to be repaid in not to exceed 40 years—Preference to municipalities and other public corporations and agencies.]—

* * * * *

EXPLANATORY NOTE

Supplementary Provision: Temporary Water. Section 220 of the Reclamation Reform Act of 1982 (Act of October 12, 1982, Public Law 97-293, 96 Stat. 1291) provides that irrigation water temporarily made available from Reclamation facilities under certain conditions may be used for irrigation, municipal or industrial purposes only to the extent covered by a contract requiring payment for the use of such water. The 1982 Act appears in Volume IV in chronological order.

NOTES OF OPINIONS

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  Miscellaneous purpose, industrial use 16
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2. Generally—Construction with other laws

The authority of the Secretary of the Interior delegated to the Bonneville Power Administrator to dispose of the output of Federal hydroelectric projects in the Pacific Northwest is derived primarily from the Bonneville Project Act of 1937 and is supplemented by the Reclamation laws (particularly section 9(c) of the Reclamation Project Act of 1939) and section 5 of the Flood Control Act of 1944. All of these Acts have a common purpose and should be read *in pari materia* to ascertain the intent of Congress. Solicitor Melich Opinion, M-36812, 77 I.D. 141 (1970), in re Bonneville Power Administrator's authority to acquire power from the Trojan nuclear power project.

The Bonneville Project Act of 1937, section 9(c) of the Reclamation Project Act of 1939, and section 5 of the Flood Control Act of 1944 all have a common purpose and should be read *in pari materia* to ascertain the intent of Congress. Solicitor Weinberg Opinion, M-36769, 75 I.D. 403 (1968), in re authority of Bonneville Power Administration to participate in the integrated hydro-thermal power program for the Pacific Northwest.

6. Power—Falling water

The Secretary of the Interior may, but need not, impose upon a non-Federal power development at a Reclamation facility a charge for the lease of power privileges even though the Federal Energy Regulatory Commission has exempted the development from paying reasonable annual charges under the Federal Power Act for use of the Reclamation facility. Memorandum of Associate Solicitor Good, December 15, 1981.

The Department of the Interior does not have the authority to impose a "power privilege charge" on a Federal Power Act licensee utilizing a Bureau of Reclamation dam; the Federal Energy Regulatory Commission has the final authority to set the annual charge for the use of the dam. *Solano Irrigation District,* 14 FERC (CCH) ¶61,089, at 61,161 (1981).

Where, even though power is not an authorized purpose of a project when built, a facility is constructed with power producing ability (e.g., penstocks in Monticello Dam), if power privileges are subsequently leased to a private developer, the section 9(c) lease charges should include interest on an appropriate share of the construction investment. In contrast, where no provision has been made for development of power, section 9(c) lease charges should include only an appropriate share of annual operation and maintenance charges and "other fixed charges the Secretary deems proper" because private developers will make all capital outlays for power facilities at the project. Memorandum of Associate Solicitor Little to Commissioner, Water and Power Resources Service, October 16, 1980.

The Reclamation Project Act of 1939 established the framework for the rental charge to be assessed by the Secretary of the Interior for the power privilege or opportunity. Thus, notwithstanding the provision of section 10(e) of the Federal Power Act authorizing the Federal Energy Regulatory Commission to "fix a reasonable annual charge" for the use of government dams or structures by licensees, the Water and Power Resources Service should establish a charge for the lease of power privileges/falling water calculated according to section 9(c) of the Reclamation Project Act and such charge should be included as a component of the reasonable annual charge specified in section 10(e), which is subject to the approval of the Secretary of Interior. Memorandum of Associate Solicitor Little to Commissioner, Water and Power Resources Service, October 16, 1980.

The Federal Power Act and not section 9(c) of the Reclamation Project Act of 1939 provides the authority for non-Federal hydro power development at dams operated by the Water and Power Resources Service, but the Secretary of Interior may assess a section 9(c) charge for the lease of power privileges in a manner consistent with the provisions of the Federal Power Act. Memorandum of Associate Solicitor Little to Commissioner, Water and Power Resources Service, October 16, 1980.

In the event the State of California wishes to install a power plant at Monticello Dam, a feature of the Solano Federal Reclamation Project, it would have to obtain a license from the Federal Power Commission as well as the approval of the Secretary of the Interior. Memorandum of Acting Associate Solicitor McDowell, August 19, 1976.

7.—Contracts

Under his broad authority to enter into contracts for the sale of Colorado River Storage Project power, the Secretary of Energy has authority to include a term providing for refunds with interest of any overcharges collected while interim rates are in effect. *Colorado River Energy Distributors Association v. Lewis,* 516 F. Supp. 926, 931-32 (D.D.C. 1981), case dismissed sub nom. *Colorado River Energy Distributors Association v. Edwards,* 516 F. Supp. 933 (D.D.C. 1981).

It would not be illegal for the Secretary of the Interior to enter into a contract with a preference customer to sell it only hydroelectric power from a Reclamation project, thereby excluding the sale to it of thermal power purchased from other sources. *United States v. Sacramento Municipal Utility District,* 652 F.2d 1341 (9th Cir. 1981).

The Otter Tail Power Company may not unilaterally seek Federal Power Commission approval of higher rates for transmitting power for the Bureau of Reclamation to the Bureau's customers prior to the termination of the transmission contract between the Bureau and the company executed on June 14, 1955. The Supreme Court decision in *Otter*

Tail Power Co. v. United States, 410 U.S. 366 (1973), rendering invalid the provisions of the contract that permitted Otter Tail to refuse to transmit power to proposed municipal systems in communities where it had been selling power at retail rates, did not vitiate the remainder of the contract. *Otter Tail Power Company v. Federal Power Commission,* 536 F.2d 240 (8th Cir. 1976).

The prohibition in the 1939 act and the 1906 act against contracts or leases of electric power or power privileges that "impair the efficiency of the project for irrigation purposes" applies to hydraulic or mechanical efficiency, not financial equity. Thus, it does not require that irrigators buying power from a Reclamation project and using it for irrigation pumping must be charged a lower rate than customers using the power for commercial purposes. Memorandum of Assistant Solicitor Pelz, April 24, 1975, in re claim of Arvin-Edison Water Storage District to purchase power from the Central Valley Project at the 2.5 mill project energy rate rather than the commercial rate.

A provision in a contract between the Bureau of Reclamation and the Otter Tail Power Company relieving the company of the obligation to wheel power to municipalities which it served at retail at the time the contract was made, does not protect the company from the finding that its refusal to wheel was a violation of the "attempt to monopolize" clause of section 2 of the Sherman Act. *Otter Tail Power Company v. United States,* 410 U.S. 366 (1973), affirming *United States v. Otter Tail Power Company,* 331 F. Supp. 54 (D. Minn. 1971).

8.—Rates

The grant to the Secretary of Energy, by section 9(c) of the Reclamation Project Act of 1939 and section 302(a) of the Department of Energy Organization Act, of complete power over ratemaking provides sufficient authority to establish rates on an interim basis. Explicit statutory authority to set rates on an interim basis is not required. The broad authority of section 9(c) to set the terms on the sale of power also permits the Secretary to require, as one of the terms of the sale of Colorado River Storage Project power, that interim rates be collected, subject to refund with interest. *Colorado River Energy Distributors Association v. Lewis,* 516 F. Supp. 926, 930-31 (D.D.C. 1981), case dismissed sub nom. *Colorado River Energy Distributors Association v. Edwards,* 516 F. Supp. 933 (D.D.C. 1981).

Reauthorization of the Grass Rope Unit as a unit of the Pick-Sloan Missouri Basin Program is a prerequisite to providing power to the unit at the 2½ mill rate for energy used to operate project facilities. Memorandum of Acting Associate Solicitor McBride, June 15, 1981.

The establishment of a confirm and approve power regarding rates of the Western Area Power Administration, and rates of the Alaska Power Administration for the Snettisham project, constitutes an appropriate action by the Secretary of Energy to subdivide his basic rate-making function in a manner designed to encourage uniformity and objective decision-making regarding the rate-making for all the power marketing administrations. Memorandum of General Counsel Coleman, October 14, 1978, in re proposed delegation to the Federal Energy Regulatory Commission of rate confirmation authority for the Department of Energy's power marketing agencies.

It is well within the Secretary of Energy's broad discretion under the Department of Energy Organization Act to delegate to the Assistant Secretary the authority to confirm and approve rates on an interim basis and to delegate or assign to the Federal Energy Regulatory Commission the authority to confirm and approve rates on a final basis. Memorandum of General Counsel Coleman, October 14, 1978, in re proposed delegation to the Federal Energy Regulatory Commission of rate confirmation authority for the Department of Energy's power marketing agencies.

The authority to establish rates on an interim basis is a necessary corollary of, and inherent in, the basic authority to set rates. Memorandum of General Counsel Coleman, October 14, 1978, in re proposed delegation to the Federal Energy Regulatory Commission of rate confirmation authority for the Department of Energy's power marketing agencies.

The sale of replacement energy on the basis of payment of 85% of the savings in the cost of the fuel that is replaced is permissible because the power marketing statutes do not require that the price for each category of service must be based on the cost of that service. Memorandum of Assistant Solicitor Pelz, May 20, 1976, in re pricing of replacement energy based on sharing in fuel savings.

The prohibition in the 1939 act and the 1906 act against contracts or leases of electric power or power privileges that "impair the efficiency of the project for irrigation purposes" applies to hydraulic or mechanical efficiency, not financial equity. Thus, it does not require that irrigators buying power from a Reclamation project and using it for irrigation pumping must be charged a lower rate than customers using the power for commercial purposes. Memorandum of Assistant Solicitor Pelz, April 24, 1975, in re claim of Arvin-Edison Water Storage District to purchase power from the Central Valley Project at the 2.5 mill project energy rate rather than the commercial rate.

The administrative practice of the Bureau of Reclamation is that the 2.5 mill rate, which is used by the Bureau as a matter primarily of internal accounting to transfer power operation, maintenance and replacement expense from the power purpose of the project to the water purpose for cost suballocation and repayment purposes, applies only to power used to operate pumps that were built as Federal facilities as part of the project, which facilities remain the property of the United States in accordance with Reclamation law. The fact that the original contract with the Arvin-Edison Water Storage District provided, as then required by the Distribution System Loans Act, that the Government hold title to its facilities until the loan was repaid, does not bring Arvin-Edison's pumps within this practice because the only purpose for granting title to the United States was to provide security for the repayment of its loan. In any event, this requirement was eliminated in 1972. Memorandum of Assistant Solicitor Pelz, April 24, 1975.

The inclusion in Bureau of Reclamation power rate schedules of added charges for unauthorized overruns by the customer equal to five times the normal charges for power and energy is well within the implied authority of the Secretary of the Interior to market power from Reclamation projects. Letter of Acting Solicitor Lindgren to Chairman Reuss, Subcommittee on Conservation and Natural Resources, January 3, 1975.

Section 9(c) of the Reclamation Project Act of 1939 requires that, for the purpose of power ratemaking, the rate and repayment study must show that the proposed rates will produce sufficient revenues in each year of the study (except for a possible initial short transition period) to cover operation and maintenance expenses during the year, including purchased power and wheeling but excluding depreciation and replacements, together with the required interest cost for the year, except as interest may be deferred and capitalized in accordance with sound business principles. This is a minimum requirement and is independent of the requirement for repayment of the construction investment. A similar requirement is found in section 5 of the Flood Control Act of 1944. Assistant Solicitor Pelz Opinion, M-36874, 81 I.D. 72 (1974).

Subsection 9(c) of the Reclamation Project Act of 1939 which, under section 4 of the Colorado River Storage Project Act, is expressly made applicable to projects governed by the latter Act, vests broad authority in the Secretary to fix the rates at which electric power from Reclamation projects is sold. Thus, where the government realizes substantial savings by entering into wheeling contracts with local utilities in lieu of constructing an all-Federal transmission system for the Colorado River Storage Project, but in the case of the cities of Bountiful, Provo and St. George, Utah, the cost of connecting to the utilities' system will be greater than it would have been for connecting to the all-Federal system, the Secretary has discretionary authority to defray such additional costs out of the savings realized by entering into contracts with the affected preference customers which would reduce their charges for project power by the amount of their additional costs. Dec. Comp. Gen. B-170905 (November 2, 1970).

10.—Preference customers

In view of the special circumstances that the United States had only three months to find purchasers for the interim power from the Navajo thermal-generation power plant in Page, Arizona, that the purchasers needed to provide transmission and spinning reserves, and that the power was expected to be available for only six years, there was no violation of the preference clause when the United States entered into contracts to sell a substantial portion of the power to nonpreference utilities without a withdrawal clause. The preference clause was not meant to interfere with the primary purpose of the Reclamation Project Act—water conservation and reclamation. *City of Anaheim v. Duncan*, 658 F.2d 1326 (9th Cir. 1981).

The Departments of the Interior and Energy have long recognized Federal agencies as equal preference entities under section 9(c) of the Reclamation Project Act of 1939 within the term "other public corporations or agencies." Statement of Administrator McPhail, in re final marketing plan, Central Valley Project, 46 Fed. Reg. 51224, 51227 (1981).

A joint venture between a municipality and a utility company will not qualify under the preference laws. Letter of Administrator McPhail to W.M. Claypool III, City of Needles, March 22, 1979.

The City of Santa Clara does not have a "property" interest in an "entitlement" to Central Valley Project power as against other preferred entities entitling it to constitutional due process, but it does have such an interest as against nonpreference entities such as Pacific Gas and Electric company. *City of Santa Clara, California v. Andrus*, 572 F.2d 660, 675-77 (9th Cir. 1978), reversing *City of Santa Clara v. Kleppe*, 418 F. Supp. 1243 (N.D. Cal. 1976), cert. denied sub nom. *Pacific Gas and Electric Co. v. City of Santa Clara*, 439 U.S. 859 (1978).

The preference clause does not require that all preference customers be treated equally or that all potential preference customers receive an allotment, nor does it prevent the Secretary of the Interior from discriminating against some preference entities to the benefit of others. Since there is thus no law to apply, the Secretary's refusal to allocate nonwithdrawable power to Santa Clara is precluded from judicial review under 5 U.S.C. § 701(a)(2) of the Administrative Procedure Act. *City of Santa Clara, California v. Andrus*, 572 F.2d 660, 666-68 (9th Cir. 1978), reversing *City of Santa Clara, California v. Kleppe*, 418 F. Supp. 1243 (N.D. Cal. 1976), cert. denied sub nom. *Pacific Gas and Electric Co. v. City of Santa Clara*, 439 U.S. 859 (1978).

An arrangement, somewhat misleadingly referred to as "banking", under which power from the Central Valley Project is sold to the Pacific Gas and Electric Company (PG&E) subject to the right of the Secretary of the Interior to repurchase an equal amount at a later date at the original purchase price plus a "handling charge," does not of itself satisfy the preference clause. Accordingly, the allegation that the rates to PG&E violated Santa Clara's preference rights will be remanded to the trial court for further proceeding on the issues of whether Santa Clara was ready, willing and able to purchase the power sold to PG&E and whether a sale to Santa Clara would impair the efficiency of the project for irrigation purposes. *City of Santa Clara, California v. Andrus*, 572 F.2d 660, 669-72 (9th Cir. 1978), reversing *City of Santa Clara v. Kleppe*, 418 F. Supp. 1243 (N.D. Cal. 1967), cert. denied sub nom. *Pacific Gas and Electric Co. v. City of Santa Clara*, 439 U.S.859 (1978).

The fact that Congress appropriated funds for the construction of the extra high voltage Pacific Northwest-Pacific Southwest Intertie does not support a finding of Congressional ratification of the exclusion of post-1964 preference customers from receiving nonwithdrawable Central Valley Project power as part of the Intertie arrangements. *City of Santa Clara, California v. Andrus*, 572 F.2d 660, 672 (9th Cir. 1978), reversing *City of Santa Clara v. Kleppe*, 418 F. Supp. 1243 (N.D. Cal. 1976), cert. denied sub nom. *Pacific Gas and Electric Co. v. City of Santa Clara*, 439 U.S. 859 (1978).

A request for a preliminary injunction against the continued sale of "interim power' from the Navajo powerplant to a nonpreference customer will be denied where the requesting cities had not made an offer to buy the power at the time the contract was entered into. *City of Anaheim, California v. Kleppe*, 590 F.2d 285 (9th Cir. 1978).

The decision of the Secretary of the Interior reallocating power from the Parker-Davis project is not judicially reviewable as to claims among preference entities as there is no law to apply. *The Fort Mojave Indian Tribe, et al v. United States*, U.S.D.C., C.D. California, CV77-4790 ALS (1978).

When the Secretary of the Interior notified the California-Pacific Utilities Company (Cal-Pac), a nonpreference customer, that its 1958 20-year contract to purchase power from the Parker-Davis project would be allowed to expire and would not be renewed, the Secretary was not required to notify customers of Cal-Pac who might be preference entities. They have no "property" interest in the power as against other preferred entities and therefore no due process claims. Publication of notice in the Federal Register of a proposed reallocation of Parker-Davis power that included a reallocation of the power sold to Cal-Pac, was sufficient. *The Fort Mojave Indian Tribe, et al. v. United States*, U.S.D.C., C.D. California, CV77-4790 ALS (1978).

An arrangement under which a utility company buys Federal power and agrees to resell it to its normal residential and commercial customers within the boundaries of a municipality does not qualify under the preference laws. In order for a municipality to qualify as a preference customer it must assume utility responsibility for its load to be served and be ready, willing and able to receive and distribute the Federal power as of the date the power is offered or within a reasonable time thereafter. This in turn requires that the preference customer have available transmission and distribution facilities adequate to deliver power from the Federal delivery points to its loads. Memorandum of General Counsel Coleman, November 17, 1978, in re request of City of Needles for reinstatement of sales of Federal power for benefit of its citizens.

The sale of "interim power" from the coal-fired Navajo plant from the time it begins operation in 1974 until the power is needed for pumping for the Central Arizona Project, estimated to occur in 1980, is governed by the preference clause. The direction in section 303(d) of the Colorado River Basin Project Act to the Secretary to recommend "the most feasible plan" for obtaining pumping power for the Central Arizona Project does not comprehend the right to sell "interim power" in a manner that is in conflict with the preference clause. *Arizona Power Pooling Association v. Morton*, 527 F.2d 721, 725, 728-29 (9th Cir. 1975), cert. denied sub nom. *Arizona Public Service Co. v. Arizona Power Pooling Association*, 425 U.S. 911 (1976).

The preference clause in subsection 9(c) of the Reclamation Project Act of 1939 is subject to the limitation in the proviso that no contract shall be made which in the judgment of the Secretary impairs the efficiency of the project for irrigation purposes. *Arizona Power Pooling Association v. Morton*, 527 F.2d 721, 726-28, 729-30 (9th Cir. 1975), cert. denied sub nom. *Arizona Public Service Co. v. Arizona Power Pooling Association*, 425 U.S. 911 (1976).

The fact that Congress appropriated funds to finance the Federal share of the cost of constructing the coal-fired Navajo plant did not constitute Congressional ratification of an alleged departure from the preference clause in the negotiation of contracts for the sale of "interim power" from the plant. *Arizona Power Pooling Association v. Morton*, 527 F.2d 721, 725-26 (9th Cir. 1975), cert. denied sub nom. *Arizona Public Service Company v. Arizona Power Pooling Association*, 425 U.S. 911 (1976).

The replacement energy sales program of the Eastern Division of the Pick-Sloan Missouri Basin Program on a de-escalating price-block basis does not violate the preference clause where the administration of the program properly protects the interests of the preference customers, recognizing, among other things, that the long-term capability of the Federal hydropower system to supply firm power is set aside for preference customers; that long-term and seasonal peaking power and short-term firm power capabilities are offered at fixed rates first to preference customers; that all preference customers benefit from the program because the revenue produced reduces *pro tanto* the revenues needed to be recovered from preference customers under fixed rate schedules; and that the preference customers have participated, in a substantial way, in the replacement energy program. Memorandum of Assistant Solicitor Pelz, May 20, 1976, in re pricing of replacement energy based on sharing in final savings.

There is judicial review of allegations that the Secretary did not follow the preference clause in negotiating contracts for the sale of power because there is "law to apply." *Arizona Power Pooling Association v. Morton*, 527 F.2d 721, 726-28 (9th Cir. 1975), cert. denied sub nom. *Arizona Public Service Co. v. Arizona Power Pooling Association*, 425 U.S. 911 (1976).

The Secretary of the Interior does not have utility responsibility to serve the load growth of preference customers. Memorandum of Assistant Solicitor Pelz to Commissioner of Reclamation, November 26, 1974, in re authority of Bureau of Reclamation to purchase capacity and energy.

The Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, in particular, and other Indian tribes generally, organized to provide municipal government within the territory or reservation, are, in all material respects, a public corporation or agency, and therefore qualify as preference customers for the purchase of power under section 9(c) of the Reclamation Project Act of 1939, as amended. Memorandum of Solicitor Barry, M-36771, July 25, 1967.

11.—Supremacy clause

The Supremacy Clause of Article VI of the Constitution precludes a state from interfering with the operation of Federal policies constitutionally mandated by Congress. Thus, as section 9(c) of the Reclamation Project Act of 1939 and section 9(c) of the Flood Control Act of 1944 Congressionally authorize the terms for the sale of hydroelectric power from Reclamation projects by the Secretary of the Interior, the Iowa State Commerce Commission correctly found that it lacked the power to restrain the Bureau of Reclamation from disposing of such hydroelectric power to certain Iowa municipalities even though such sales might have been in violation of Iowa law. *Iowa Public Service Co. v. Iowa State Commerce Commission*, 407 F.2d 916 (8th Cir. 1969), cert. denied, 396 U.S. 826 (1969).

12.—Transmission lines

The authority of the Secretary of the Interior to market power from Reclamation projects includes the implied authority to construct transmission lines. Memorandum of Associate Solicitor Hogan, April 14, 1967, in re authority to undertake research and development in high-voltage underground transmission.

13.—Purchase or exchange

Language in the Contributed Funds Act which authorizes the expenditure of funds for "any other development work . . . involving operations similar to those provided by the reclamation law," is not sufficient to authorize the Bureau of Reclamation to buy supplemental power to augment the capacity of the strictly limited Pick-Sloan Missouri Basin Project through the withdrawal of money from trust funds established by various preference customers, inasmuch as the Bureau has no general authority to purchase power to augment the capabilities of its various projects. Memorandum of Associate Solicitor Garner to Assistant Commissioner of Reclamation, February 6, 1975, in re proposal by Mid-West Electric Consumers Association, Inc.

The Secretary of the Interior presumably has implied authority to purchase small amounts of capacity from time to time to help fulfill his contract obligations to sell power to preference customers in unusual circumstances where water conditions fall short of expectations upon which the contracts were entered into, assuming that the contracts themselves were validly developed. Memorandum of Assistant Solicitor Pelz to Commissioner of Reclamation, November 26, 1974.

The authority of Interior's power marketing agencies to acquire thermal power and energy by purchase as well as exchange in order more effectively to utilize the Federal hydropower capability to serve customers' requirements in accordance with the mandates of the Bonneville Project Act of 1937, section 9(c) of the Reclamation Project Act of 1939, and section 5 of the Flood Control Act of 1944, is well established. Solicitor Weinberg Opinion, M-36769, 75 I.D. 403 (1968), in re authority of the Bonneville Power Administration to participate in the integrated hydro-thermal power program for the Pacific Northwest. Accord, Solicitor Melich Opinion, M-36812, 77 I.D. 141 (1970).

The purchase of power from the Centralia coal-plant to enable the Bureau of Reclamation to more fully utilize the hydropower capability of the Central Valley Project to meet its growing project and customer loads, and to enable the Bonneville Power Administration to overcome a deficiency in firm power during a three-year period, is well within the statutory authority of the Secretary of the Interior under the Bonneville Project Act of 1937, the Reclamation laws, particularly section 9(c) of the Reclamation Project Act of 1939, and section 5 of the Flood Control Act of 1944. Memorandum of Assistant Solicitor Pelz, January 2, 1968.

14.—Allocation and ratemaking procedures

The requirement in 5 U.S.C § 552 to publish in the Federal Register rules of procedure and rules of general applicability does not require the Secretary of the Interior to publish rules for the allocation of Central Valley Project power where no such rules, substantive or procedural, have been formulated. *City of Santa Clara, California, v. Andrus*, 572 F.2d 660, 672-75 (9th Cir. 1978), reversing *City of Santa Clara v. Kleppe*, 418 F. Supp. 1243 (N.D. Cal. 1976), cert. denied sub nom. *Pacific Gas and Electric Co. v. City of Santa Clara*, 439 U.S. 859 (1978).

The procedures followed by the Western Area Power Administration in developing rates for the Colorado River Storage Project, which included publication of proposed rates in the Federal Register, presentation at public meetings, and the solicitation of oral and written comments, comply with the notice and comment requirements of section 553 of the Administrative Procedure Act. *Colorado River Energy Distributors Association v. Lewis*, 516 F. Supp. 926, 930 (D.D.C. 1981); case dismissed sub nom. *Colorado River Energy Distributors Association v. Edwards*, 516 F. Supp. 933 (D.D.C. 1981).

When the Secretary of the Interior notified the California-Pacific Utilities Company (Cal-Pac), a nonpreference customer, that its 1958 20-year contract to purchase power from the Parker-Davis project would be allowed to expire and would not be renewed, the Secretary was not required to notify customers of Cal-Pac who might be preference entities. They have no "property" interest in the power as against other preferred entities and therefore no due process claims. Publication of notice in the Federal Register of a proposed reallocation of Parker-Davis power that included a reallocation of the power sold to Cal-Pac was sufficient. *The Fort Mojave Indian Tribe, et al. v. United States,* U.S.D.C., C.D. California, CV77-4790ALS (1979).

The requirement in 5 U.S.C. § 552(a)(1) that each agency must publish its rules of procedure means that the Bureau of Reclamation must develop a reasonably complete code of procedures by which actions can be guided and strategies planned before increasing rates for power from the Central Valley Project and publish these in advance in the Federal Register or give customers actual and timely notice of the procedures in advance. *Northern California Power Agency v. Morton*, 396 F. Supp. 1187, 1191-92 (D.D.C. 1975). [Editor's Note: To the contrary see: *City of Santa Clara v. Andrus*, 572 F.2d 660, 672-75 (9th Cir. 1978); *Greenwood Utilities Commission v. Schlesinger*, 515 F. Supp. 653, 659-61 (M.D. Ga. 1981).]

Where the Government concedes that the plaintiffs, as preference customers, have a statutory interest entitled to some degree of due process protection, due process requires that the basis for a rate increase for the Central Valley Project be set forth in sufficient detail to permit those affected to make a meaningful response; limited on-the-record questioning of the proponents should be allowed to lay bare their assumptions and reasoning; and the decision-maker must set forth the underlying findings and reasoning which led him to his conclusion. *Northern California Power Agency v. Morton*, 396 F. Supp. 1187 (D.D.C. 1975).

16. Water—Miscellaneous purposes, industrial use

By authorizing the Secretary of the Interior to enter into contracts to supply project water for "municipal water supply or miscellaneous purposes," section 9(c) of the Reclamation Project Act of 1939 permits the sale of water for industrial purposes from the Yellowtail and Boysen Reservoirs of the Missouri River Basin. It is clear that section 1(b) of the Flood Control Act of 1944 approved the disposition of project water for industrial purposes. It is also evident that the phrase "municipal water supply or miscellaneous purposes" was intended to encompass industrial purposes, as 1) the Act of June 21, 1963 expressly authorizes the renewal of contracts previously made under the 1939 Act for "municipal, domestic or industrial" purposes, 2) both section 2(b) of the Act of February 25, 1956 and section 301 of the Water Supply Act of 1958 illustrate that Congress has long associated municipal use with industrial use, and 3) Congress has been made aware of the Secretary's actions in selling project water for industrial use under the authority of the 1939 Act and has not objected. *Environmental Defense Fund, Inc. v. Morton*, 420 F. Supp. 1037 (D. Mont. 1976), aff'd sub nom. *Environmental Defense Fund, Inc. v. Andrus*, 596 F.2d 848 (9th Cir. 1979).

The Miscellaneous Water Supply Act of 1920 is inapplicable to the sale of water for industrial purposes from the Yellowtail and Boysen Reservoirs of the Missouri River Basin. The projects were built as multipurpose projects under sections 1(b) and 9 of the Flood Control Act of 1944 and the Bureau was authorized by the 1944 Act and section 9(c) of the Reclamation Project Act of 1939 to enter into the subject contracts. *Environmental Defense Fund, Inc. v. Morton*, 420 F. Supp. 1037 (D. Mont. 1976), aff'd sub nom. *Environmental Defense Fund, Inc. v. Andrus*, 596 F.2d 848 (9th Cir. 1979).

In contracting to supply water for industrial purposes from the Yellowtail and Boysen Reservoirs of the Missouri River Basin the Secretary was not obligated to comply with the Water Supply Act. Such sale is independently authorized by section 9(c) of the Reclamation Project Act of 1939 and the Water Supply Act expressly declares that it "shall be a alternative to and not a substitute for the provisions of the [1939 Act]." *Environmental Defense Fund, Inc. v. Morton*, 420 F. Supp. 1037 (D. Mont. 1976), aff'd sub nom. *Environmental Defense Fund, Inc. v. Andrus*, 596 F.2d 848 (9th Cir. 1979).

In determining whether the sale of water for industrial use from the Yellowtail and Boysen Reservoirs will impair the efficiency of the Missouri River Basin Project, it is clear from section 9(c) of the Reclamation Project Act of 1939 that the only relevant factors are those which relate to the irrigation efficiency of the project. The Secretary is not required to consider the adequacy of the water supply for the irrigation of all lands in a river basin or the State of Montana nor is he obligated to engage in a balancing of all factors related to the use of the water. *Environmental Defense Fund, Inc. v. Morton*, 420 F. Supp. 1037 (D. Neb. 1976), aff'd sub nom. *Environmental Defense Fund, Inc. v. Andrus*, 596 F.2d 848 (9th Cir. 1979).

Where the Secretary determines that it may require more than forty years to use all of the capacity provided for irrigation in the six mainstream reservoirs of the Missouri River Basin Pick-Sloan Project, he is authorized to market for municipal and industrial purposes water which would otherwise have been stored for the probable extent of future irrigation under contracts which will expire before it becomes feasible to market such water for irrigation. This authority is derived from section 9(c) of the 1939 Reclamation Project Act, which authorizes the Secretary to market water for municipal and miscellaneous purposes so long as such sales will not impair the efficiency of the project for irrigation purposes, as well as the legislative history of the 1944 Flood Control Act which clearly demonstrates that Missouri River Basin water was intended for multi-purpose use, including domestic and industrial uses. Memorandum of Solicitor Frizzell to Secretary, November 27, 1974.

17.—Contracts, when required

Private irrigation diversions (those undertaken or financed independently of Federal Reclamation law) from main-stem Corps of Engineers reservoirs on the Missouri River and the Columbia River System are subject to Federal Reclamation law, including the "excess lands" provisions of section 5 of the Reclamation Act of 1902 and section 46 of the Omnibus Adjustment Act of 1926 and the water service contract requirements of section 9(c) of the Reclamation Project Act of 1939, unless (1) the private diverter's water supply does not depend on the existence or operation of Federal project facilities at any time during the irrigation season, and (2) the diversion does not interfere with the authorized purposes of the Federal project. Letter of April 27, 1970 from the Secretary to the Governors of ten States.

18.—Rates

Rates for the sale of regulatory water supply from Ruedi Reservoir may be established pursuant to section 301(b) of the Water Supply Act of 1958 rather than section 9(c)(2) of the Reclamation Project Act of 1939 as, at the time construction was authorized, Congress was notified that repayment of municipal and industrial costs would be governed by the Water Supply Act, interest on water supply has already been deferred for ten years, and the language of the Water Supply Act specifies that its provisions are available as an alternative to those of the Reclamation Project Act. Memorandum of Assistant Solicitor Mauro to Regional Solicitor, Rocky Mountain Region, March 20, 1981, in re proposed sale of water—Fryingpan-Arkansas Project.

In determining the amount of fixed charges under a section 9(c)(2) water service contract, the Secretary is entitled to include the amount of interest on money borrowed for new capital investments to operate and maintain the facility after it is in operation. In calculating such charges the Secretary is not limited to the 3½% interest rate prescribed in section 9(c)(1) as that section applies only to the interest rate chargeable on initial investment capital, but the Secretary is subject to an arbitrary and capricious standard. Memorandum of Associate Solicitor Little to Commissioner, Water and Power Resources Service, October 15, 1980, in re appropriate interest rate—Central Valley Project.

In order to promote more efficient use of water for industrial purposes, the Secretary has discretionary authority to fix water rates for municipal and industrial uses of water at amounts greater than necessary to return construction costs plus interest and annual operation, maintenance and replacement costs because section 9(c)(2) of the Reclamation Project Act of 1939 authorizes the Secretary to determine such chargeable construction costs as he deems proper and provides for the setting of "such rates as in the Secretary's judgment will produce revenues *at least* sufficient to cover" operation and maintenance costs, (emphasis supplied). Nothing in the legislative history evidences a Congressional intent to preclude the Secretary from exercising his authority under this section to provide for rates in excess of those estimated in the original project feasibility studies, and after payout of a project the revenues received under section 9(c)(2) contracts can, without further authorization, be used for other purposes in cases where there are basin accounts. Moreover, at least one Supreme Court decision has held that rates set under contracts authorized by this section may be fixed so as to return more than the costs allocated to the service provided. Memorandum of Assistant Solicitor London to Commissioner of Reclamation, September 27, 1974.

The Contributed Funds Act authorizes the Bureau of Reclamation to accept a contribution of $5,000,000 from the Westlands Water District to advance construction work on the distribution system and section 9(c) of the Reclamation Project Act of 1939 authorizes the Bureau to offset the value of the District's contribution by entering into a short-term (approximately five years) interim water service contract under which the District would be charged lower than the long-term rates. However, if the District's contribution is to be offset by charging it lower water rates for the short-term, then the cost of the facilities constructed with the contribution should be included in the total repayable actual cost of the distribution system to the District so that the United States, through payments made on the distribution system contract, will recoup the foregone water service revenues. Memorandum of Acting Associate Solicitor Miron to Commissioner of Reclamation, April 16, 1968.

19.—Repayment

The 50-year rolling repayment policy, whereby as each unit of the Central Valley Project is authorized the repayment period for all project contracts entered into under sections 9(c)(2) and 9(e) of the Reclamation Project Act of 1939 is extended for fifty years from the date of the latest authorization, is not inconsistent with the Secretary's authority to enter into these contracts "for such periods, not to exceed forty years," as this language limits only the length of the contract itself but not the repayment period. Memorandum of Associate Solicitor Little to Commissioner, Water and Power Resources Service, November 26, 1980.

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Sec. 9.(d) [No water delivered until repayment contract executed providing (1) development period for each irrigation block, (2) construction cost allocable to irrigation to be included in general repayment obligation (distribution of construction charges may vary based on productivity of land and benefits accruing), (3) repayment in annual installments over period not exceeding 40 years, (4) first annual installment on date fixed by Secretary.]—

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EXPLANATORY NOTE

Supplementary Provision: Changes in Acreage Limitations, Pricing and Contracts. The Reclamation Reform Act of 1982 (Title II, Act of October 12, 1982, Public Law 97-293, 96 Stat. 1261, 1263, 43 U.S.C. §§ 390aa to 390zz-1 makes major changes in the acreage limitations on, the pricing of, and the contracts for the delivery of irrigation water from Reclamation projects. The 1982 Act appears in Volume IV in chronological order.

NOTES OF OPINIONS

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5. Repayment—Account charge

Where appropriate, the Secretary has authority to impose an account charge on agricultural lands under a section 9(d) contract. This charge would conform the total charge to the landowner's ability to pay by imposing a higher per-acre charge on the owner of a small suburban tract not used for commercial farming; such owner being more akin to a municipal and industrial water user than a commercial farmer. Although section 9(d) (2) provides that the allocation of construction charges be varied in a manner which takes land productivity into account, there is no indication that productivity must be the sole basis for determining ability to pay. Rather, section 9(d) provides the Secretary with broad discretion to establish repayment charges. Memorandum of Assistant Solicitor Mauro to Commissioner of Reclamation, June 10, 1981.

6.—Contributed funds

The Contributed Funds Act authorizes the Bureau of Reclamation to accept a contribution of $5,000,000 from the Westlands

Water District to advance construction work on the distribution system and section 9(c) of the Reclamation Project Act of 1939 authorizes the Bureau to offset the value of the District's contribution by entering into a short-term (approximately five years) interim water service contract under which the District would be charged lower than the long-term rates. However, if the District's contribution is to be offset by charging it lower water rates for the short-term, then the cost of the facilities constructed with the contribution should be included in the total repayable actual cost of the distribution system to the District so that the United States, through payments made on the distribution system contract, will recoup the foregone water service revenues. Memorandum of Acting Associate Solicitor Miron to Commissioner of Reclamation, April 16, 1968.

10. Water rights

The Flood Control Act of 1944 cannot be construed as a statutory grant to water users in the Missouri River Basin of a right to have stored waters from the Yellowtail and Boysen Reservoirs released, without a repayment contract, to augment the stream flow of the Yellowstone River. No language in the Act can be interpreted as creating such rights. Moreover, Reclamation statutes such as section 9(d) of the Reclamation Project Act of 1939 require the Secretary to enter into repayment contracts for the use of project waters. Finally, such interpretation would be contrary to the intent of the excess land requirements of section 46 of the Omnibus Adjustment Act of 1926 and fundamental Reclamation law, which require repayment contracts for water. *Environmental Defense Fund, Inc. v. Morton*, 420 F. Supp. 1037 (D. Mont. 1976), aff'd sub nom. *Environmental Defense Fund, Inc. v. Andrus*, 596 F.2d 848 (9th Cir. 1979).

Pages 655-656

Sec. 9.(e) [Short- or long-term contracts to furnish water for irrigation—Payment in advance of delivery of water—Cost of distribution works to be covered by repayment contract under subsec. (d).]—

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EXPLANATORY NOTE

Supplementary Provision: Changes in Acreage Limitations, Pricing and Contracts. The Reclamation Reform Act of 1982 (Title II, Act of October 12, 1982, Public Law 97-293, 96 Stat. 1261, 1263, 43 U.S.C. §§ 390aa to 390zz-1 makes major changes in the acreage limitations on, the pricing of, and the contracts for the delivery of irrigation water from Reclamation projects. The 1982 Act appears in Volume IV in chronological order.

NOTE OF OPINION

2. Repayment

The 50-year rolling repayment policy, whereby as each unit of the Central Valley Project is authorized the repayment period for all project contracts entered into under sections 9(c)(2) and 9(e) of the Reclamation Project Act of 1939 is extended for fifty years from the date of the latest authorization, is not inconsistent with the Secretary's authority to enter into these contracts "for such periods, not to exceed forty years," as this language limits only the length of the contract itself but not the repayment period. Memorandum of Associate Solicitor Little to Commissioner, Water and Power Resources Service, November 26, 1980.

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Sec. 9. (f) [Proposed contracts or amendments thereto—Public notice and participation.]—No less than sixty days before entering into or amending any repayment contract or any contract for the delivery of irrigation water (except any contract for the delivery of surplus or interim irrigation water whose duration is for one year or less) the Secretary shall—

(1) publish notice of the proposed contract or amendment in newspapers of general circulation in the affected area and shall make reasonable efforts to otherwise notify interested parties which may be affected by such contract or amendment, together with information indicating to whom comments or inquiries concerning the proposed actions can be addressed; and

(2) provide an opportunity for submission of written data, views and arguments, and shall consider all substantive comments so received. (96 Stat. 1273; § 226, Act of October 12, 1982, 96 Stat. 1261; 43 U.S.C. § 485h(f)).

EXPLANATORY NOTE

1982 Amendment. Section 226 of the Reclamation Reform Act of 1982 (Act of October 12, 1982, Public Law 97-293, 96 Stat. 1261, 1273) amended section 9 by adding a new subsection (f) as it appears above. The 1982 Act appears in Volume IV in chronological order.

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Sec. 10. [Removal of sand, gravel, and other minerals from withdrawn lands without competitive bidding—Authority to grant leases, licenses, easements, and rights-of-way.]—

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NOTES OF OPINIONS

Construction with other laws 4
Easements and rights-of-way 3
Withdrawn lands, mineral location 5

3. Easements and rights-of-way

The proviso in section 10(b) of the Reclamation Project Act of 1939, which requires the approval of the water users' organization for easements or rights-of-way of more than twenty-five years duration, was intended to protect the water users by preventing the United States from allowing permanent improvements on or across project works which would add to or impair the operation and maintenance of the project. This proviso does not however, grant the Weber River Water Users Association any control over the Secretary's grant of a right-of-way to the State of Utah across lands in the Weber Basin Project for construction of Interstate Highway I-80 as the proposed highway is above the reach of the Echo Reservoir and will have no effect on project maintenance and operations. Memorandum of Acting Associate Solicitor Morthland to Regional Solicitor, Salt Lake City, May 1, 1969.

4. Construction with other laws

Under sections 4(e) and 24 of the Federal Power Act the Federal Energy Regulatory Commission has the exclusive authority to authorize a licensee to enter and occupy Federal lands for the purpose of developing water projects at governmental dams. Where the licensee is to install a powerplant at a Reclamation dam, the permission of the Water and Power Resources Service is not required. *Solano Irrigation District*, 14 FERC (CCH) ¶61,089, at 61,161 (1981).

The authority granted to the Secretary by section 10 of the Reclamation Project Act of 1939 to grant leases, licenses, easements and rights-of-way affecting lands acquired by the Water and Power Resources Service is not affected by the authority of the Federal Energy Regulatory Commission, under section 4(e) of the Federal Power Act, to grant licenses to non-Federal developers to construct hydropower facilities on Service-administered land. Moreover, section 4(e) specifically provides that its licenses shall be subject to such conditions as the Secretary shall deem necessary.

Memorandum of Associate Solicitor Little to Commissioner, Water and Power Resources Service, August 19, 1980.

5. Withdrawn lands, mineral location

As section 10 of the Reclamation Project Act of 1939 explicitly refers only to lands withdrawn "in connection with the construction or operation and maintenance of any project" and not to lands to be irrigated by the project, it is couched in the language of a first form withdrawal under section 3 of the Reclamation Act and does not close to mineral location lands withdrawn under second form withdrawals. *M.G. Johnson*, IBLA 70-14, 78 I.D. 107 (April 5, 1971).

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Sec. 12. [Liability of United States on contracts for services, supplies, etc., contingent upon appropriations.]—

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NOTE OF OPINION

2. Construction with other laws

Because section 11 of the Small Reclamation Projects Act expressly provides that it "shall be a supplement to the Federal reclamation laws," section 12 of the Reclamation Project Act of 1939 applies to Small Reclamation Projects Act projects. Memorandum of Associate Solicitor Leshy to Deputy Assistant Secretary, Land and Water Resources, September 7, 1977, in re proposed contract with De Luz Heights Municipal Water District, California.

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Sec. 14. [Authority to purchase or condemn lands for relocating highways, roadways, railroads, telegraph, telephone, and electric transmission lines—Exchange Government properties—Grant perpetual easements—Exchange or replacement of water, water rights, or electric energy.]—

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NOTE OF OPINION

2. Relocations—Roads

Reimbursement to landowners for the relocation expenses they incur as a result of the acquisition of a right-of-way over their land to relocate California State Highway No. 49 is governed by the Moving Expense Act of May 29, 1958 and not by Chapter 5 of the Federal Aid Highway legislation, even assuming State Highway No. 49 was constructed with Federal Aid Funds. The highway relocation is an integral part of the construction of the Central Valley Project's Auburn-Folsom South Unit and is therefore performed under authority of section 14 of the Reclamation Project Act of 1939. Memorandum of Associate Solicitor Morthland to Commissioner of Reclamation, March 20, 1970.

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Sec. 17.(b) [Deferment of construction charges.]—

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NOTE OF OPINION

1. Construction with other laws

The language of section 3 of the Act of September 21, 1959 [which amended section 17(b) of the Reclamation Project Act of 1939] providing that any project "within the administrative jurisdiction" of the Secretary of the Interior will be governed by its provisions, makes the Act applicable to all projects for which the Secretary is the contracting officer, even though certain projects so included are not constructed as Reclamation projects. Thus, as section 5 of the Small Reclamation Projects Act authorizes the Secretary to administer the repayment contracts for projects constructed with loans authorized thereunder, the Secretary has authority, pursuant to the 1959 Act, to grant deferments to the Georgetown Divide Water District, California, a project financed under the Small Reclamation Projects Act. Memorandum of Associate Solicitor Miron to Commissioner of Reclamation, January 22, 1969.

SUMNER DAM AND LAKE SUMNER, CARLSBAD PROJECT

Page 667

Sec. 7. [Sumner Dam and Lake Sumner authorized.]—The Sumner Dam and Lake Sumner on the Pecos River, New Mexico, is authorized and declared to be for the purposes of controlling floods, regulating the flow of the Pecos River, providing for storage and for delivery of stored waters, for the reclamation of lands, and other beneficial uses, and said dam and reservoir shall be used, first, for irrigation; second, for flood control and river regulation; and third, for other purposes. The Chief of Engineers and the Secretary of the Army are directed to report to the Congress the amount of the total cost of said Sumner Dam and Lake Sumner which is properly allocable to flood control. The appropriation and transfer of such amount from the general fund of the Treasury to the reclamation fund, for credit by reduction of the maximum obligation of the Carlsbad Irrigation District to repay the total cost thereof, is authorized. (53 Stat. 1417; Act of October 17, 1974, 88 Stat. 1363; 33 U.S.C. § 707)

EXPLANATORY NOTE

Change of Name. The Act of October 17, 1974 (Public Law 93-447, 88 Stat. 1363) redesignated "Alamogordo Dam and Reservoir" as "Sumner Dam and Lake Sumner," respectively. The 1974 Act appears in Volume IV in chronological order.

WATER CONSERVATION AND UTILIZATION ACT

Page 672

Sec. 4.(b) [Term "reimbursable construction costs" defined.]—

* * * * *

EXPLANATORY NOTE

Supplementary Provision: Nonreimbursable Costs. The Act of October 29, 1971 (Public Law 92-149, 85 Stat. 416) provides that studies of water conservation requirements of existing projects relating to work for which repayment contracts have not been executed prior to October 29, 1971 shall be nonreimbursable. The 1971 Act appears in Volume IV in chronological order.

ACQUISITION OF INDIAN LANDS FOR COLUMBIA BASIN PROJECT

Pages 688-690

[Sec. 1. Acquisition of Indian lands and property within Spokane and Colville Reservations for Columbia Basin project—Indian hunting, fishing and boating rights in reservoir.]—

* * * * *

NOTES OF OPINIONS

Indian rights in Columbia River reservoir 1
Reservation boundaries 2

1. Indian rights in Columbia River reservoir

The Indians have a reserved and therefore exclusive interest in the Indian zone under the 1940 Act, subject to the use of the reservoir for project operations. In addition to having exclusive hunting, fishing and boating rights in the Indian zone, the tribes also have authority to regulate the use of that area by others for such purposes. Solicitor Frizzell Opinion, June 3, 1974.

2. Reservation boundaries

The boundaries of the Colville and Spokane Indian Reservations were unchanged by the 1940 Act. Solicitor Frizzell Opinion, June 3, 1974.

VOLUME II

COLUMBIA BASIN PROJECT ACT

Pages 729-733

Sec. 2. [Farm units—Excess lands—Anti-speculation.]—*Repealed.*

* * * * *

NOTES OF OPINIONS

Excess lands, price approval 1
Withdrawal of land from project 2

1. Excess lands, price approval

After passage of the Act of October 1, 1962 (Public Law 87-728, 76 Stat. 677), the holder of excess lands on the Columbia Basin Project must sell those lands at a price approved by the Secretary of the Interior, until one-half of the construction charges are paid, if the land is to receive project water after the sale. The fact that the lands were subject to a recordable contract, executed under section 2 of the Act of March 10, 1943, eliminating the price-approval requirement five years after notice of availability of project water, did not give the landowner a vested right against extension of the price-approval requirement thereafter. *Israel v. Morton*, 549 F. 2d 128 (9th Cir. 1977).

2. Withdrawal of land from project

The United States is an indispensable party to an action alleging the abridgement by the State of Washington of plaintiff's rights under the Columbia Basin Project Act to withdraw land from the East Columbia Basin Irrigation District before an election to approve an amendatory repayment contract between the United States and the irrigation district. The interests of the United States are jeopardized in that if plaintiff and others standing in his position are allowed to withdraw their lands from the irrigation district, the financial solvency of the project will be threatened and the chance of repayment to the United States of money invested in the project will be damaged. *Franz v. East Columbia Basin Irrigation District*, 383 F.2d 391 (9th Cir. 1967).

Pages 733-735

Sec. 4. [Purposes for which project is to be administered—Contracts to be consistent with sound project development—Qualification of applicants for irrigation farming—Farm units not suitable for settlement.]—

* * * * *

NOTES OF OPINIONS

2. Sale or exchange of project lands

In authorizing the Secretary to exchange Columbia Basin Project lands for the purposes of "facilitating project development," section 4(a) of the Columbia Basin Project Act authorizes the Bureau of Reclamation to exchange federally-owned project lands for privately-owned lands desired for fish and wildlife enhancement purposes, even though fish and wildlife conservation was not a purpose of the project as reauthorized by the Act of March 10, 1943. The combined effect of sections 2(c), 2(g) and 3(c) of the Fish and Wildlife Coordination Act makes fish and wildlife conservation an integral part of a previously authorized water control project if 60 percent of the estimated project construction costs was not obligated as of August 12, 1958. As of 1966, only 42 percent of the estimated construction cost of the Columbia Basin Project had been obligated. Memorandum of Acting Associate Solicitor McDowell to Commissioner of Reclamation, May 25, 1977, in re proposed exchange of lands with Carl Ellingsen.

Under the restrictions set forth in section 4(b) of the Columbia Basin Project Act, land may be sold by means of a negotiated sale only if the purchaser is the sole qualified preference purchaser and only at a price which is not less than the appraised value of the land. In all cases in which there are others equally qualified to buy the land, the sale should be by sealed bids to the highest bidder. Memorandum of Acting Associate Solicitor McDowell to Commissioner of Reclamation, May 25, 1977 in re proposed exchange of lands with Carl Ellingsen.

AMENDED CONTRACT AND ADJUSTMENT OF LANDS AND REVENUES, KLAMATH PROJECT

Page 788

EXPLANATORY NOTE

Codification Omitted. Subsections 2(b) and (c) of the Act of June 17, 1944 (58 Stat. 279), relating to lands and revenues of the Klamath Project, originally were codified at 43 U.S.C. § 612 but were omitted from the 1976 and subsequent editions of the U.S. Code as having limited applicability.

INTERIOR DEPARTMENT APPROPRIATION ACT, 1945

Page 790

[General provisions—Operation and maintenance administration.]—

* * * * *

EXPLANATORY NOTE

Provision Continued. This paragraph is incorporated by reference in each annual appropriation act through the most recent one reviewed for this publication, the Energy and Water Development Appropriation Act, 1982 (95 Stat. 1140), which was continued for fiscal year 1983 by section 101(f) of the Further Continuing Appropriations Act for Fiscal Year 1983 (96 Stat. 1906).

FLOOD CONTROL ACT OF 1944

Pages 796-798

[Sec. 1. Policy of Congress—Federal-state cooperation in plans—Review of project proposals—Reports to Congress—Proposed works to which objections are made not to be deemed authorized unless by Act of Congress.]—

* * * * *

EXPLANATORY NOTES

Change of Name. The "Department of War" and the "Secretary of War" have been known since 1947 as the "Department of the Army" and the "Secretary of the Army," respectively. See section 205(a), (b) Act of July 26, 1947 (61 Stat. 501).

Supplementary Provision: Phase I Design Memorandum Stage. Section 101(c) of the Water Resources Development Act of 1976 (Act of October 22, 1976, Public Law 94-587, 90 Stat. 2917) provides that whenever the Chief of the Corps of Engineers transmits a recommendation for a water resources development project to the Secretary of the Army for transmittal to Congress, as authorized by section 1 of this Act, the Chief of Engineers is authorized to undertake the phase I design memorandum stage of advanced engineering and design of such project if he finds and transmits to the Public Works Committees of the Congress that the project is without substantial controversy and justifies further engineering, economic, and environmental investigations. Section 101(c) of the 1976 Act also provides that authorization for such phase I work for a project shall terminate on the date of enactment of the first Water Resources Development Act enacted after the date such work is first authorized. Extracts from the 1976 Act, not including section 101(c), appear in Volume IV in chronological order.

NOTES OF OPINIONS

3. Industrial use

By authorizing the Secretary of Interior to enter into contracts to supply project water for "municipal water supply or miscellaneous purposes" section 9(c) of the Reclamation Project Act of 1939 permits the sale of water for industrial purposes from the Yellowtail and Boysen Reservoirs of the Missouri River Basin. It is clear that section 1(b) of the Flood Control Act of 1944 approved the disposition of project water for industrial purposes. It is also evident that the phrase "municipal water supply or miscellaneous purposes" was intended to encompass industrial purposes, as 1) the Act of June 21, 1963 expressly authorizes the renewal of contracts previously made under the 1939 Act for "municipal, domestic or industrial" purposes, 2) both section 2(b) of the Act of February 25, 1956 and section 301 of the Water Supply Act of 1958 illustrate that Congress has long associated municipal use with industrial use, and 3) Congress has been made aware of the Secretary's actions in selling project water for industrial use under the authority of the 1939 Act and has not objected. *Environmental Defense Fund, Inc. v. Morton,* 420 F. Supp. 1037 (D. Mont. 1976), aff'd sub nom. *Environmental Defense Fund, Inc. v. Andrus,* 596 F.2d 848 (9th Cir. 1979).

The Miscellaneous Water Supply Act of 1920 is inapplicable to the sale of water for industrial purposes from the Yellowtail and Boysen Reservoirs of the Missouri River Basin. The projects were built as multipurpose projects under sections 1(b) and 9 of the Flood Control Act of 1944 and the Bureau was authorized by the 1944 Act and section 9(c) of the Reclamation Project Act of 1939 to enter into the subject contracts. *Environmental Defense Fund, Inc. v. Morton,* 420 F. Supp. 1037 (D. Mont. 1976), aff'd sub nom. *Environmental Defense Fund, Inc. v. Andrus,* 596 F.2d 848 (9th Cir. 1979).

Pages 799-800

Sec. 4. [Recreation facilities at Army water resource development projects—Leases at such projects for other purposes—Natural resources development—Rules and regulations—Violations and penalties—Issue of process—Disposition of revenues.]—The Chief of Engineers, under the supervision of the Secretary of the Army, is authorized to construct, maintain, and operate public park and recreational facilities at water resource development projects under the control of the Department of the Army, to permit the construction of such facilities by local interests (particularly those to be operated and maintained by such interests), and to permit the maintenance and operation of such facilities by local interests. The Secretary of the Army is also authorized to grant leases of lands, including structures or facilities thereon, at water resource development projects for such periods, and upon such terms and for such purposes as he may deem reasonable in the public interest: *Provided,* That leases to nonprofit organizations for park or recreational purposes may be granted at reduced or nominal considerations in recognition of the public service to be rendered in utilizing the leased premises: *Provided further,* That preference shall be given to Federal, State, or local governmental agencies, and licenses or leases where appropriate, may be granted without monetary considerations, to such agencies for the use of all or any portion of a project area for any public purpose, when the Secretary of the Army determines such action to be in the public interest, and for such periods of time and upon such conditions as he may find advisable: *And provided further,* That in any such lease or license to a Federal, State, or local governmental agency which involves lands to be utilized for the development and conservation of fish and wildlife, forests, and other natural resources, the licensee or lessee may be authorized to cut timber and harvest crops as may be necessary to further such beneficial uses and to collect and utilize the proceeds of any sales of timber and crops in the development, conservation, maintenance, and utilization of such lands. Any balance of proceeds not so utilized shall be paid to the United States at such time or times as the Secretary of the Army may determine appropriate. The water areas of all such projects shall be open to public use generally for boating, swimming, bathing, fishing, and other recreational purposes, and ready access to and exits from such areas along the shores of such projects shall be maintained for general public use, when such use is determined by the Secretary of the Army not to be contrary to the public interest, all under such rules and regulations as the Secretary of the Army may deem necessary, including but not limited to prohibitions of dumping and unauthorized disposal in any manner of refuse, garbage, rubbish, trash, debris, or litter of any kind at such water resource development projects, either into the waters of such projects or onto any land federally owned and administered by the Chief of Engineers. Any violation of such rules and regulations shall be punished by a fine of not more than $500 or imprisonment for not more than six months, or both. Any persons charged with the violation of such rules and regulations may be tried and sentenced in accordance with the provisions of section 3401 of title 18 of the United

States Code. All persons designated by the Chief of Engineers for that purpose shall have the authority to issue a citation for violation of the regulations adopted by the Secretary of the Army, requiring the appearance of any person charged with violation to appear before the United States magistrate, within whose jurisdiction the water resource development project is located, for trial; and upon sworn information of any competent person any United States magistrate in the proper jurisdiction shall issue process for the arrest of any person charged with the violation of said regulations; but nothing herein contained shall be construed as preventing the arrest by any officer of the United States, without process of any person taken in the act of violating said regulations. No use of any area to which this section applies shall be permitted which is inconsistent with the laws for the protection of fish and game of the State in which such area is situated. All moneys received by the United States for leases or privileges shall be deposited in the Treasury of the United States as miscellaneous receipts. (58 Stat. 889; §4, Act of July 4, 1946, 60 Stat. 642; §209, Act of September 3, 1954, 68 Stat. 1266; §207, Act of October 23, 1962, 76 Stat. 1195; §2(a), Act of September 3, 1964, 78 Stat. 899; §234, Act of December 31, 1970, 84 Stat. 1833; 16 U.S.C. §460d).

EXPLANATORY NOTES

1970 Amendment. Section 234 of the Act of December 31, 1970 (Public Law 91-611, 84 Stat. 1833) amended section 4 by adding the language that appears above following "all under such rules and regulations as the Secretary of the Army may deem necessary," and preceding "No use of any area". Extracts from the 1970 Act, not including section 234, appear in Volume IV in chronological order.

Change of Name. The "Department of War" and the "Secretary of War" have been known since 1947 as the "Department of the Army" and the "Secretary of the Army," respectively. See section 205(a), (b) Act of July 26, 1947 (61 Stat. 501).

Pages 800-804

Sec. 5. [Surplus electric power and energy generated at Army projects shall be marketed by Secretary of Energy—Rate schedules—Construction of transmission facilities—Preference customers—Disposition of revenues.]—

* * * * *

EXPLANATORY NOTES

Change of Name. The "Department of War" and the "Secretary of War" have been known since 1947 as the "Department of the Army" and the "Secretary of the Army," respectively. See section 205(a), (b), Act of July 26, 1947 (61 Stat. 501).

Transfer of Functions. Section 302(a) of the Department of Energy Organization Act of 1977 (Act of August 4, 1977, Public Law 95-91, 91 Stat. 565) transferred all functions of the Secretary of the Interior under this section to the Secretary of Energy and section 301(b) of the 1977 Act also transferred the function of the Federal Power Commission under this section to the Secretary of Energy. Extracts from the 1977 Act, including sections 302(a) and 301(b), appear in Volume IV in chronological order.

NOTES OF OPINIONS

Amendment of contracts 10
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"Widespread use" 14

1. Construction with other laws

The authority of the Secretary of the Interior delegated to the Bonneville Power Administrator to dispose of the output of Federal hydroelectric projects in the Pacific Northwest is derived primarily from the Bonneville Project Act of 1937 and is supplemented by the Reclamation laws (particularly section 9(c) of the Reclamation Project Act of 1939) and section 5 of the Flood Control Act of 1944. All of these Acts have a common purpose and should be read in *pari materia* to ascertain the intent of Congress. Solicitor Melich Opinion, M-36812, 77 I.D. 141 (1970), in re Bonneville Power Administrator's authority to acquire power from the Trojan nuclear power project.

The Bonneville Project Act of 1937, section 9(c) of the Reclamation Project Act of 1939, and section 5 of the Flood Control Act of 1944 all have a common purpose and should be read *in pari materia* to ascertain the intent of Congress. Solicitor Weinberg Opinion, M—36769, 75 I.D. 403 (1968), in re authority of Bonneville Power Administration to participate in the integrated hydro-thermal power program for the Pacific Northwest.

3. Judicial proceedings

Even if section 5 of the Flood Control Act of 1944 were found to be so vague as to "breathe discretion at every pore," in deciding on the geographic area within which and the preference customers to whom power will be marketed by the Southwestern Power Administration, this court would still have jurisdiction to review for *abuse* of that discretion. *Greenwood Utilities Commission v Schlesinger,* 515 F. Supp. 653, 657-59 (M.D. Ga. 1981). [Editor's Note: This holding was reversed on appeal sub nom. *Greenwood Utilities Commission v. Hodel,* 764 F.2d 1459, 1464-65 (11th Cir. 1985).]

Rate making under the Flood Control Act of 1944 is not "committed to agency discretion by law" within the meaning of 5 U.S.C. § 701(a)(2) and is therefore subject to judicial review. *Associated Electric Cooperative, Inc., v. Morton,* 507 F.2d 1167, 1176-77 (D.C. Cir. 1974), cert. denied, 423 U.S. 830 (1975).

4. Delegation

The trifurcated arrangement of the Secretary of Energy's Delegation Order No. 0204-33 of December 1978, delegating rate development to the local Power Marketing Administration, rate approval and interim implementation to the Assistant Secretary of Energy, and final approval to the independent Federal Energy Regulatory Commission, does as much as possible to resolve the command of section 5 of the Flood Control Act of 1944 that there be an independent check on ratemaking and the command of the Department of Energy Organization Act that ratemaking be made more efficient through the centralization of control in one officer, the Secretary of Energy. *United States v. Tex-La Electric Cooperative, Inc.,* 693 F.2d 392, 411-12 (5th Cir. 1982), reversing *United States v. Tex-La Electric Cooperative, Inc.,* 524 F. Supp. 409 (E.D. La. 1981) and *United States v. Northeast Texas Electric Cooperative, Inc.,* Civil Action No. H-81-604 (S.D. Tex. 1981).

It is well within the Secretary of Energy's broad discretion under the Department of Energy Organization Act to delegate to the Assistant Secretary the authority to confirm and approve rates on an interim basis and to delegate or assign to the Federal Energy Regulatory Commission the authority to confirm and approve rates on a final basis. Memorandum of General Counsel Coleman, October 14, 1978, in re proposed delegation to the Federal Energy Regulatory Commission of rate confirmation authority for the Department of Energy's power marketing agencies.

5. Studies

The provisions in the Act of August 9, 1955 (69 Stat. 618) limiting appropriations for water resources investigations in Alaska to $250,000 per year does not apply to general investigations and planning and resource studies of the Alaska Power Administration which are justified under other laws, such as the Eklutna Project authorization of July 31, 1950, 64 Stat. 382, as amended; the Snettisham project authorization in section 204 of the Flood Control Act of 1962, 76 Stat. 1193; section 5 of the Flood Control Act of 1944, 58 Stat. 890; and the Public Land Administration Act of 1961, 43 U.S.C. §1362. Acting Solicitor Weinberg Opinion, M-36727 (March 27, 1968).

6. Preference clause

Determination of compliance with statutory preference requirements must be made at the time the contract is entered into and is not intended to permit subsequent revision of power contracts because of changed conditions. *Arkansas Power & Light Company v. Schlesinger*, Civil Action No. 79-1263 (D.D.C. 1980).

The Secretary of the Interior does not have utility responsibility to serve the load growth of preference customers. Memorandum of Assistant Solicitor Pelz to Commissioner of Reclamation, November 26, 1974, in re authority of Bureau of Reclamation to purchase capacity and energy.

7. Purchases of power

The Administrator of the Bonneville Power Administration is authorized to enter into trust-agency arrangements to purchase power for preference agency customers as part of the proposed Phase 2 of the region's Hydrothermal Power Program. The contracts are within the broad authority of section 2(f) of the Bonneville Project Act of 1937 and are in furtherance of the purpose of section 5 of the Flood Control Act of 1944 to promote the most widespread use of Federal power at the lowest possible rate to consumers consistent with sound business principles, the authority given the Administration in section 2(b) of the 1937 Act to interchange energy, and the directive of section 6 of the 1937 Act to encourage the equitable distribution of Federal energy. Dec. Comp. Gen. B-137458 (September 13, 1974).

The authority of the Department of Interior's power marketing agencies to acquire thermal power and energy by purchase as well as exchange in order more effectively to utilize the Federal hydropower capability to serve customers' requirements in accordance with the mandates of the Bonneville Project Act of 1937, section 9(c) of the Reclamation Project Act of 1939, and section 5 of the Flood Control Act of 1944, is well established. Solicitor Weinberg Opinion, M-36769, 75 I.D. 403 (1968), in re authority of the Bonneville Power Administration to participate in the integrated hydro-thermal power program for the Pacific Northwest. *Accord*, Solicitor Melich Opinion, M-36812, 77 I.D. 141 (1970).

The purchase of power from the Centralia coal-plant to enable the Bureau of Reclamation to more fully utilize the hydropower capability of the Central Valley Project to meet its growing project and customer loads, and to enable the Bonneville Power Administration to overcome a deficiency in firm power during a three-year period, is well within the statutory authority of the Secretary of the Interior under the Bonneville Project Act of 1937, the Reclamation laws, particularly section 9(c) of the Reclamation Project Act of 1939, and section 5 of the Flood Control Act of 1944. Memorandum of Assistant Solicitor Pelz, January 2, 1968.

The Southwestern Power Administration is not authorized under section 5 of the Flood Control Act of 1944 or the continuing fund statute to enter into a forty-year contract to purchase the entire output of a steam generating plant to be built by its Arkansas Electric Cooperative Corporation. *Arkansas Electric Coop. Corp. v. Arkansas-Missouri Power Co.*, 255 S.W. 2d 674 (Ark. 1953). [Editor's Note: This holding is included herein only for historical interest.]

9. Repayment of costs

The legislative history of the parenthetical phrase in section 7 of the Bonneville Project Act, that rate schedules shall be drawn to recover costs "upon the basis of the application of such rate schedules to the capacity of the electric facilities" of the project, shows that Congress did not expect regular annual amortization payments to be made. Therefore, the phrase precludes the assessment of an interest or other monetary penalty for failure to meet a scheduled annual payment. Congressional endorsement of the absence of a binding schedule for annual amortization payments was reiterated in the 1966 House Interior Committee report on the third powerhouse at Grand Coulee Dam. Memorandum of Deputy Assistant General Counsel Pelz, November 26, 1982, in re scheduled annual repayment for power investment.

The fact that Congress appropriated funds to the Southwestern Power Administration to carry out contracts which resulted in deficits does not mean that Congress intended that the Secretary of the Interior sell power at less than cost contrary to the explicit directive of section 5 of the Flood Control Act of 1944. *Associated Electric Cooperative, Inc. v. Morton*, 507 F.2d 1167, 1173-75 (D.C. Cir. 1974), cert. denied, 423 U.S. 830 (1975).

Section 9(c) of the Reclamation Project Act of 1939 requires that, for the purpose of power ratemaking, the rate and repayment study must show that the proposed rates will produce sufficient revenues in each year of the study (except for a possible initial short transition period) to cover operation and maintenance expense during the year, including purchased power and wheeling but excluding depreciation and replacements, together with the required interest cost for the year, except as interest may be deferred and capitalized in accordance with sound business principles. This is a minimum requirement and is independent of the requirement for repayment of the construction investment. A similar requirement is found in section 5 of the Flood Control Act of 1944. Assistant Solicitor Pelz Opinion, M-36874, 81 I.D. 72 (1974).

A payout period for the Narrows Dam Project of 100 years from the date on which the Project commenced commercial operation and 83 years from the date of installation of the third generating unit does not comply with the requirement of section 5 of the Flood Control Act of 1944 that the capital investment allocated to power be amortized over a "reasonable period of years." However, rates which achieve payout within 50 years after the Project's newest generating unit became commercially operable are acceptable. *United States Department of the Interior, Southwestern Power Administration, Narrows Dam Project,* 45 F.P.C. 183 (1971).

It has long been established that 50 years is a "reasonable period of years" within which to repay the government's investment in power facilities. *United States Department of the Interior, Bonneville Power Administration,* 34 F.P.C. 1462, 1466 (1965).

10. Amendment of contracts

A thirty-year contract for the sale of power for the benefit of a new aluminum plant which provided for certain maximum rate increases at the end of each five-year period and was valid at the time it was entered into cannot be altered or repudiated by the Government on the grounds that it later became disadvantageous because of changing economic conditions. *Arkansas Power & Light Company v. Schlesinger,* Civil Action No. 79-1263 (D.D.C. 1980).

12. Rates

In enacting section 6 of the Bonneville Project Act and patterning section 5 of the Flood Control Act of 1944 after that section, Congress intended that the Federal Power Commission apply its ratemaking expertise partly to protect consumers from undue rate increases instituted by the local power administrators. *United States v. Tex-La Electric Power Cooperative, Inc.*, 693 F.2d 392, 398-400 (5th Cir. 1982).

Under section 5 of the Flood Control Act of 1944 and section 6 of the Bonneville Project Act of 1937, the Federal Power Commission had inherent authority to approve rates for an interim period. *United States v. Tex-La Electric Cooperative, Inc.*, 693 F.2d 392, 408-09 (5th Cir. 1982), reversing *United States v. Tex-La Electric Cooperative, Inc.*, 524 F.Supp. 409 (E.D. La. 1981) and *United States v. Northeast Texas Electric Cooperative, Inc.*, Civil Action No. H–81–604 (S.D. Tex. 1981). [Editor's Note: The November 1982 decision of the Court of Appeals for the Fifth Circuit in *United States v. Tex-La Electric Cooperative, Inc.*, 693 F.2d 392, upholding the interim rate authority of the Secretary of Energy, was held in 1983 to require vacation of the August 1982 contrary ruling of the United States District Court for the Southern District of Texas in *United States v. Sam Rayburn Dam Electric Cooperative, Inc.*, Civil Action No. H–80–1781. See February 15, 1983 order of the District Court vacating the earlier judgment; April 25, 1983 judgment for the United States; and July 27, 1983 per curiam order of the Fifth Circuit in Nos. 82–2564 and 83–2341 affirming this judgment (noted at 712 F.2d 1414), cert. denied, 104 S. Ct. 997 (1984).]

Section 301(b) of the Department of Energy Organization Act transfers to the Secretary of Energy the rate confirmation and approval function of the Federal Power Commission under section 5 of the Flood Control Act of 1944. *United States v. Tex-La Electric Cooperative, Inc.*, 693 F.2d 392, 395-96 (4th Cir. 1982).

Despite the implication in sections 301(b)(2) and 501(a)(1) to the contrary, the unification in the hands of the Secretary of Energy of the separate functions of the Secretary of the Interior to prepare rates and of the Federal Power Commission to confirm and approve rates, amends section 5 of the Flood Control Act of 1944 to alter the strict procedural requirements of a bifurcated rate implementation scheme. *United States v. Tex-La Electric Cooperative, Inc.*, 693 F.2d 392, 404 (5th Cir. 1982).

The Secretary of Energy is without authority under sections 301(b) and 501(a)(1) of the Department of Energy Organization Act to place power rates into effect on an interim basis without confirmation and approval by the Federal Energy Regulatory Commission, as successor to the Federal Power Commission, as required by section 5 of the Flood Control Act of 1944. *City of Fulton v. United States*, 680 F.2d 115 (Ct. Cl. 1982). [Editor's Note: affirmed sub nom. *United States v. City of Fulton*, 751 F.2d 1255 (Fed. Cir. 1985), reversed, 475 U.S. ——, 89 L.Ed 2d 661, 106 S. Ct. 1422 (1986).]

In preparing and reviewing rate and repayment studies in support of power rate increases, neither the Secretary of the Interior nor the Federal Power Commission was obliged to make a second assessment of each and every cost figure derived by the Corps of Engineers. *Tex-La. Electric Cooperative, Inc. v. Andrus*, No. 77–1445, Civil 1219–71 (D.C. Cir. 1978) (unpublished memorandum—see Local Rule 8(f)).

The rate and repayment method for setting power rates is reasonable and fully consistent with section 5 of the Flood Control Act of 1944. A "cost of service" study is not required. *Tex-La Electric Cooperative, Inc. v. Andrus*, No. 77–1445, Civil 1219–71 (D.C. Cir. 1978) (unpublished memorandum – see Local Rule 8(f)).

Pursuant to section 301(b) of the Department of Energy Organization Act, the confirmation and approval authority of the Federal Power Commission for Federal power marketing rates is vested in the Secretary of Energy. Memorandum of General Counsel Coleman, October 14, 1978, in reproposed delegation to the Federal Energy Regulatory Commission of rate confirmation authority for the Department of Energy's power marketing agencies.

The imposition of a transmission service charge falls within the Secretary's rate making authority under section 5 of the Flood Control Act of 1944 and is valid even though it has the effect of offsetting contract credits for transmission services. *Associated Electric Cooperative, Inc., v. Morton*, 507 F.2d 1167, 1175-76 (D.C. Cir. 1974), cert. denied, 423 U.S. 830 (1975).

A rate distinction between those companies which take their power directly from the high voltage grid of the Southwestern Power Administration (SPA) and those which require delivery of power by SPA beyond SPA's high voltage grid is not unreasonable. *Associated Electric Cooperative, Inc. v. Morton*, 507 F.2d 1167, 1177 (D.C. Cir. 1974), cert. denied, 423 U.S. 830 (1975).

The Bonneville Project Act and the Flood Control Act of 1944 provide the dual statutory standard, for rates for Federal power, of providing consumers with the benefits of power at the lowest possible price consistent with good business practices as well as protecting the interests of the United States in amortizing its investment in the project within a reasonable period of years. *United States Department of the Interior, Bonneville Power Administration*, 34 F.P.C. 1462, 1462, 1465 (1965).

The jurisdiction of the Federal Power Commission under the Bonneville Project Act and section 5 of the Flood Control Act of 1944 to review rates can neither be analogized to an independent rate investigation nor to the appellate function of United States Courts of Appeals over Commission decisions under the Federal Power Act. Congress expected the Commission to apply its independent expertise in evaluating the rates set by the Secretary of the Interior but did not mean that the Commission should supplant the Secretary's responsibility and discretion for initiating appropriate rates nor make a *de novo* determination. *United States Department of the Interior, Bonneville Power Administration*, 34 F.P.C. 1462, 1465 (1965).

13. Procedural requirements

Federal Power commission approval of rates under section 5 of the Flood Control Act is rule making, for which an evidentiary hearing is not required. Moreover, because it involves a rate revision on the sale of public power, it is exempt, under 5 U.S.C. § 553(a)(2), from the notice and comment requirements of § 553 of the Administrative Procedure Act. *Associated Electric Cooperative, Inc. v. Morton*, 507 F.2d 1167, 1177-78 (D.C. Cir. 1974), cert. denied, 423 U.S. 830 (1975).

Notice of proposed rate increases for power sold by the Southwestern Power Administration and the opportunity to submit written comments fully satisfies procedural requirements under section 5 of the Flood Control Act of 1944. No formal hearings were necessary. Publication in the Federal Register was not necessary. The Secretary of the Interior and the Federal Power Commission were not required to respond to every comment submitted by the customers. *Tex-La Electric Cooperative, Inc. v. Andrus*, No. 77–1445, Civil 1219-71 (D.C. Cir. 1978) (unpublished memorandum—see Local Rule 8(f)).

Without deciding whether or not the plaintiff utilities commission located in northwest Mississippi had a property interest as a preference customer in obtaining power from the Southeastern Power Administration (SEPA), it received all the process to which it was due where SEPA corresponded and met with it regarding its application for power, awarded it ample opportunity to present its side, and gave genuine consideration to its request before making a final decision. *Greenwood Utilities Commission v. Schlesinger*, 515 F. Supp. 653, 661-62 (M.D. Ga. 1981). [Editor's Note: affirmed sub nom. *Greenwood Utilities Commission v. Hodel*, 764 F.2d 1459, 1465 (11th Cir. 1985)].

Power from Federal hydroelectric projects is "public property" and thus was exempt from the rulemaking requirement of section 553 of the Administrative Procedure Act (APA) before the exemption was eliminated by section 501(b)(3) of the Department of Energy Organization Act. However, if the criteria used by the Southeastern Power Administration for allocating power had become so"crystallized" as to be considered a "rule" or "regulation" within the meaning of section 552 of the APA, they would have to be published. *Greenwood Utilities Commission v. Schlesinger*, 515 F. Supp. 653, 659-61 (M.D. Ga. 1981).

14. "Widespread use"

Even if the"widespread use" standard of section 5 of the Flood Control Act of 1944 were applicable to allocations of power from Reclamation projects among preference customers, there would be no judicial review of the refusal of the Secretary of the Interior to allocate nonwithdrawable power to the city of Santa Clara, because the standard is too vague and general to provide law to apply. *City of Santa Clara, California v. Andrus*, 572 F.2d 660, 666-68 (9th Cir. 1978), reversing *City of Santa Clara v. Kleppe*, 418 F. Supp. 1243 (N.D. Cal. 1976), cert. denied sub nom. *Pacific Gas and Electric Co. v. City of Santa Clara*, 439 U.S. 859 (1978).

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Sec. 6. [Contracts for sale of surplus water at Army projects—Disposition of revenues.]—

* * * * *

Sec. 7. [Regulations for use of storage allocated to flood control or navigation at all reservoirs constructed wholly or in part with Federal funds to be prescribed by Secretary of the Army—TVA exception.]—

* * * * *

EXPLANATORY NOTE

Change of Name. The "Department of War" and the "Secretary of War" have been known since 1947 as the "Department of the Army" and the "Secretary of the Army," respectively. See section 205(a), (b) Act of July 26, 1947 (61 Stat. 501).

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Sec. 8. [Utilization of Army dam and reservoir projects for irrigation pursuant to Reclamation laws—Existing projects excepted.]—

* * * * *

EXPLANATORY NOTE

Change of Name. The "Department of War" and the "Secretary of War" have been known since 1947 as the "Department of the Army" and the "Secretary of the Army," respectively. See section 205(a), (b) Act of July 26, 1947 (61 Stat. 501).

Supplementary Provision: Applicability of Reclamation Law. Section 212 of the Reclamation Reform Act of 1982 (Act of October 12, 1982, 96 Stat. 1269, 43 U.S.C. § 390ll et seq.) exempted, with certain exceptions, lands receiving benefits from Federal water resources projects constructed by the Corps of Engineers from the provisions of Reclamation law. The 1982 Act appears in Volume IV in chronological order.

NOTES OF OPINIONS

3. Reclamation laws

[Editor's Note: History of Pine Flat Dam Acreage Limitation Controversy. In 1957 Solicitor Bennett ruled that the Reclamation laws, including the acreage limitation provisions, apply to contracts for irrigation water from Pine Flat reservoir. 64 I.D. 273 (1957); 65 I.D. 525 (1957). The Attorney General concurred. 41 Op. Atty. Gen. 377 (1958). Solicitor Bennett ruled that payment does not relieve landowners of the obligation to execute recordable contracts for excess lands as a condition to receiving water for those lands. 64 I.D. 273 (1957). Solicitor Barry concurred in 1961. 68 I.D. 370 (1961).

The dispute then shifted to the courts. A request by holders of private water rights in the Kings River for an injunction restraining officials of the Bureau of Reclamation and the Corps of Engineers from operating Pine Flat Dam in a manner that interferes with their water rights was denied. *Turner v. Kings River Conservation District*, 360 F.2d 184 (9th Cir. 1966). The United States brought suit to enjoin the Tulare Lake Canal Company from delivering project water to excess lands not covered by recordable contracts. In 1972 the district court held the statutes did not require this. *United States v. Tulare Lake Canal Company*, 340 F. Supp. 1185 (E.D. Cal. 1972). The court of appeals reversed. *United States v. Tulare Lake Canal Company*, 535 F.2d 1093 (9th Cir. 1976), cert denied, 429 U.S. 1121 (1977). On remand, the district court found for the United States on the constitutional issues raised by the defendant. The court of appeals affirmed. *United States v. Tulare Lake Canal Company*, 677 F.2d 713 (9th Cir. 1982). On certiorari, the Supreme Court vacated the judgment and remanded the case with directions to dismiss it as moot. *Tulare Lake Canal Company, v. United States*, 459 U.S. 1095 (1983). The Supreme Court's action was based upon enactment of section 212 of the Reclamation Reform Act of 1982. See Explanatory Note above entitled "Supplementary Provision: Applicability of Reclamation law."]

Supreme Court decisions holding that, in view of section 8 of the Reclamation Act of 1902, a State may impose conditions on the appropriation and distribution of water in a Federal Reclamation project which are not inconsistent with Congressional directives respecting the project, *California v. United States*, 438 U.S. 645 (1978), and that rights to water from the Colorado River that had been acquired in accordance with State laws and exercised by actual diversion and application of a specific quantity of water to a defined area of land before the effective date of the Boulder Canyon Project Act were not subject to the 160-acre limitation, *Bryant v. Yellen*, 447 U.S. 352 (1980), did not alter the conclusion that Congress intended by section 8 of the Flood Control Act of 1944 to make the acreage limitations of Reclamation law, including those imposed by section 46 of the Omnibus Adjustment Act, apply to private lands receiving irrigation benefits from the Pine Flat Project. Although section 8 of the 1902 Act is applicable generally to the Pine Flat Project: the issue resolved in *California* was not the same as the issue involving the Pine Flat Project; the Court in *California* expressly reaffirmed an earlier holding that, despite section 8 of the 1902 Act, the acreage limitations in section 5 of that Act pre-empt contrary State law and there is no reason why the acreage limitation in section 46 of the Omnibus Adjustment Act should have a different effect; and there is no exception in the Flood Control Act of 1944, applicable to the Pine Flat Project, equivalent to section 6 of the Boulder Canyon Project Act, which the Court in *Bryant* read as exempting "present perfected rights" from the acreage limitations. *United States v. Tulare Lake Canal Co.*, 677 F.2d 713 (9th Cir. 1982), cert. granted, judgment vacated, and the case remanded with directions to dismiss as moot sub nom. *Tulare Lake Canal Co. v. United States*, 459 U.S. 1095 (1983).

The diverter of water from a privately financed diversion facility would not be subject to the Federal Reclamation laws, including the acreage limitation and the residence requirement, if all the following conditions are met: (1) the total quantity of water to be diverted is covered by valid natural flow water rights derived under State law or other applicable law and regulations; (2) that same quantity would in fact be available for diversion independently of any Federal project facilities whenever needed for the irrigation of the lands upon which water is proposed to be put to beneficial use; and (3) the diversion poses no interference with the authorized purposes of the Federal project. Where the private diverter receives minor or unavoidable benefits from a Federal project which does not have irrigation as a project purpose, the Department of the Interior would not seek to apply the Reclamation laws. Conversely, where the private diverter's water supply is dependent in whole or in part on storage provided by Federal facilities for part of the irrigation season, the Federal Reclamation laws are applicable. The private diverter would be required to enter into an appropriate contract with the Secretary of the Interior respecting (1) the availability of water, (2) the rate of payment of an equitable portion of operation and maintenance and construction costs of project irrigation facilities, (3) power for irrigation pumping, (4) acreage limitation, and (5) other matters required by Reclamation law and policy. Section 8 of the Flood Control Act of 1944, as interpreted by the Ninth Circuit in *United States v. Tulare Lake Canal Company*, 535 F.2d 1093 (1976), cert. denied, 429 U.S. 1121 (1977), means that dams operated by the Secretary of the Army are to be utilized for irrigation only in accord with the Reclamation laws, whether or not additional irrigation facilities need to be constructed. As provided in section 8, the acreage limitation provisions apply to Corps of Engineers projects which provide conservation storage except those constructed in whole or in part prior to December 22, 1944. Letter from Secretary Andrus to Congressman Ullman, May 21, 1980, in re private irrigation diversions from mainstem Corps of Engineers dams and reservoirs on the Columbia River System.

The legislative history of section 8 of the Flood Control Act of 1944 shows that the Reclamation laws, including the acreage limitations of section 46 of the Omnibus Adjustment Act of 1926, apply to the Pine Flat project even though no irrigation works are constructed by the Secretary of the Interior. *United States v. Tulare Lake Canal Company*, 535 F.2d 1093, 1099-1118 (9th Cir. 1976), reversing 340 F. Supp. 1185 (E.D. Cal. 1972), cert. denied, 429 U.S. 1121 (1977).

Private irrigation diversions (those undertaken or financed independently of Federal Reclamation law) from main stem Corps of Engineers reservoirs on the Missouri River and the Columbia River System are subject to Federal Reclamation law, including the "excess lands" provisions of section 5 of the Reclamation Act of 1902 and section 46 of the Omnibus Adjustment Act of 1926 and the water service contract requirements of section 9(c) of the Reclamation Project Act of 1939, unless (1) the private diverter's water supply does not depend on the existence or operation of Federal project facilities at any time during the irrigation season, and (2) the diversion does not interfere with the authorized purposes of the Federal project. Letter of April 27, 1970 from Assistant Secretary Smith to the Governors of ten States.

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Sec. 9. [Comprehensive development of Missouri River Basin.]—

* * * * *

Explanatory Notes

Change of Name. The "Department of War" and the "Secretary of War" have been known since 1947 as the "Department of the Army" and the "Secretary of the Army," respectively. See section 205(a), (b) of July 26, 1947 (61 Stat. 501).

Supplementary Provision: Nonreimbursable Costs. The Act of October 29, 1971 (Public Law 92-149, 85 Stat. 416) provides that costs of studies relating to the comprehensive plan of development of the Missouri River Basin shall be nonreimbursable. The Act appears in Volume IV in chronological order.

Supplementary Provisions: Additional Appropriations Authorizations. In addition to the $200,000,000 authorized to be appropriated by this Act, appropriations authorized through calendar year 1974 for works undertaken or planned in the Missouri River Basin by the Secretary of the Interior are as follows: (1) Flood Control Act, July 24, 1946 (60 Stat. 641), $150,000,000, in Volume II at page 833; (2) Flood Control Act, May 17, 1950 (64 Stat. 170), $200,000,000, in Volume II at page 1004; (3) Flood Control Act, July 3, 1958 (72 Stat. 297), $200,000,000, in Volume II at page 1425; (4) Flood Control Act, July 14, 1960 (74 Stat. 480), $60,000,000, in volume III at page 1548; (5) Act of December 30, 1963 (77 Stat. 842), $16,000,000, in Volume III at page 1737; (6) Act of August 14, 1964 (78 Stat. 446) (for fiscal years 1965 and 1966), $120,000,000, in Volume III at page 1755; (7) Act of July 19, 1966 (80 Stat. 322) (for fiscal years 1967 and 1968), $68,000,000, in Volume III at page 1874; (8) Act of May 24, 1968 (82 Stat. 322) (for fiscal years 1969 and 1970), $59,000,000; (9) Act of March 25, 1970 (84 Stat. 75) (for fiscal years 1971 and 1972), $32,000,000; and (10) Act of August 10, 1972 (86 Stat. 525), $114,000,000. The 1968, 1970, and 1972 Acts appear in Volume IV in chronological order.

NOTES OF OPINIONS

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2. Repayment of costs

[Editor's Note: See also annotations under "7. 'Ultimate development' concept."]

The legislative history of the Pick-Sloan Misouri Basin Program (P–SMBP) authorization reflects a Congressional intent that an ultimate use type concept be used in the financial reporting of P–SMBP. In addition, section 302 of the Department of Energy Organization Act of 1977 specifically precludes changes in cost allocation for Reclamation projects without Congressional approval. Accordingly, Congressional approval would be necessary before the Secretary could change the basis for suballocations of power costs between commercial power and project use from ultimate use to current use, as recommended by a July 1978 audit report prepared by the Department's Office of Audit and Investigation. Memorandum of Assistant Solicitor Mauro to Commissioner, October 14, 1980.

The legislative purpose in reducing the interest rate from 3 to 2½ percent on the investment allocated to commercial power in Army facilities in the Missouri River Basin was to make the one-half percent interest saving on the 81 percent of power investment available over the years as a source of revenue to assist in the repayment of irrigation facilities included in the plan of ultimate development. Consequently, the Secretary of the Interior may not make a substantial shift in the suballocation of 19 percent of power costs of the Pick-Sloan Missouri Basin Program from interest-free irrigation to interest-bearing commercial power by changing the basis for the suballocation from "ultimate use" to "current use." Memorandum of Assistant Solicitor Pelz, June 13, 1973.

3. Power operations

The Bureau of Reclamation does not have authority under the Contributed Funds Act to withdraw money from trust funds established by customers of the Pick-Sloan Missouri Basin Program to buy supplemental power in their behalf to augment the capacity of the Program. Memorandum of Associate Solicitor Garner, February 6, 1975, in re Mid-West Electric Consumers Association, Inc., proposal for Reclamation to act as broker.

The Supremacy Clause of Article VI of the Constitution precludes a State from interfering with the operation of Federal policies constitutionally mandated by Congress. Thus, as section 9(c) of the Reclamation Project Act of 1939 and section 9(c) of the Flood Control Act of 1944 congressionally authorize the terms for the sale of hydroelectric power from Reclamation projects by the Secretary of the Interior, the Iowa State Commerce Commission correctly found that it lacked the power to restrain the Bureau of Reclamation from disposing of such hydroelectric power to certain Iowa municipalities even though such sales might have been in violation of Iowa law.*Iowa Public Service Co. v. Iowa State Commerce Commission*, 407 F.2d 916 (8th Cir. 1969), cert. denied, 396 U.S. 826 (1969).

The limitation in the Acts of August 14, 1964 (78 Stat. 466) and July 19, 1966 (80 Stat. 322), proscribing the use of appropriated funds for the initiation of any unit of the Missouri River Basin project not subsequently authorized, does not apply to transmission lines necessary for marketing power and energy from generating facilities already completed or under construction. Memorandum of Acting Solicitor Weinberg, June 29, 1967, in re authority to construct 345-KV transmission line from Fort Thompson, South Dakota, to Grand Island, Nebraska.

6. Reauthorization of units

The Act of August 14, 1964 (Public Law No. 88–442, 78 Stat. 466) and subsequent acts increasing the appropriation authorization for the Pick-Sloan Missouri Basin Program require all units of the Missouri River Basin project on which construction had not begun prior to 1964 to be reauthorized by Congress. This includes the Grass Rope Unit. Memorandum of Acting Associate Solicitor McBride, June 15, 1981.

Reauthorization of the Grass Rope Unit as a unit of the Pick-Sloan Missouri Basin Program is a prerequisite to providing power to the unit at the 2½ mill rate for energy used to operate project facilities. Memorandum of Acting Associate Solicitor McBride, June 15, 1981.

7. "Ultimate development" concept

[Editor's Note: See also annotations under "2. Repayment of costs."]

It was the intent of Congress in authorizing the Pick-Sloan Missouri Basin Program (P-SMBP) in the Flood Control Act of 1944 that the "ultimate development" concept be used to establish cost allocations and repayment obligations and Congress reaffirmed that intent in 1965 by enacting the Department's interest rate recommendation in the form of section 4(b) of the Garrison Diversion Unit reauthorization Act. The "current development" concept cannot be used for P-SBMP cost allocation and repayment purposes without the approval of Congress because such a change would violate both the intent of Congress with regard to P-SMBP and section 302 of the Department of Energy Organization Act of 1977 requiring Congressional approval of changes in cost allocations or project evaluation standards which result in a reallocation of the joint costs of completed, operational multipurpose facilities. Congressional approval of such changes can validly be secured through the appropriations process if sufficient care is taken to highlight the specific action requested distinctly and discretely, so that Congress as a whole knows exactly what is before it and can act in positive and concrete fashion. Memorandum of Solicitor Coldiron to Secretary, December 15, 1982, in re Pick-Sloan Missouri Basin Program; open audit findings.

The information before Congress at the time it authorized the Pick-Sloan Missouri Basin Program, including the findings and recommendations as to cost allocation and repayment made controlling by the Act, contemplated use of the "ultimate development" concept for cost allocation and repayment purposes. Memorandum of Solicitor Coldiron to Secretary, December 15, 1982, in re Pick-Sloan Missouri Basin Program; open audit findings.

Congress reaffirmed the intent it expressed in this Act with respect to use of the "ultimate development" concept for cost allocation and repayment purposes by enactment of the Department's interest rate recommendation in the form of section 4(b) of the Act of August 5, 1965 (79 Stat. 433, 435), the Act reauthorizing the Garrison Diversion Unit of the Pick-Sloan Missouri Basin Program. Memorandum of Solicitor Coldiron to Secretary, December 15, 1982, in re Pick-Sloan Missouri Basin Program; open audit findings.

8. Industrial water marketing—Generally

By authorizing the Secretary of Interior to enter into contracts to supply project water for "municipal water supply or miscellaneous purposes," section 9(c) of the Reclamation Project Act of 1939 permits the sale of water for industrial purposes from the Yellowtail and Boysen Reservoirs of the Missouri River Basin. It is clear that that section 1(b) of the Flood Control Act of 1944 approved the disposition of project water for industrial purposes. It is also evident that the phrase "municipal water supply or miscellaneous purposes" was intended to encompass industrial purposes, as 1) the Act of June 21, 1963 expressly authorizes the renewal of contracts previously made under the 1939 Act for 'municipal, domestic or industrial" purposes, 2) both section 2(b) of the Act of February 25, 1956 and section 301 of the Water Supply Act of 1958 illustrate that Congress has long associated municipal use with industrial use, and

3) Congress has been made aware of the Secretary's actions in selling project water for industrial use under the authority of the 1939 Act and has not objected. *Environmental Defense Fund, Inc. v. Morton*, 420 F. Supp. 1037 (D. Mont. 1976), aff'd sub nom. *Environmental Fund, Inc. v. Andrus*, 596 F.2d 848 (9th Cir. 1979).

Where the Secretary determines that it may require more than forty years to use all of the capacity provided for irrigation in the six mainstream reservoirs of the Missouri River Basin Pick-Sloan Project, he is authorized to market for municipal and industrial purposes water which would otherwise have been stored for the probable extent of future irrigation under contracts which will expire before it becomes feasible to market such water for irrigation. This authority is derived from section 9(c) of the 1939 Reclamation Project Act, which authorizes the Secretary to market water for municipal and miscellaneous purposes so long as such sales will not impair the efficiency of the project for irrigation purposes, as well as the legislative history of the 1944 Flood Control Act which clearly demonstrates that Missouri River Basin water was intended for multi-purpose use, including domestic and industrial uses. Memorandum of Solicitor Frizzell to Secretary, November 27, 1974.

9.—Yellowstone River Compact

Nothing in the Yellowstone River Compact was intended to restrict the amount of water the signatory States could use in the Big Horn River for industrial purposes so as to preclude a marketing program for the sale of water from the Yellowtail and Boysen Reservoirs for industrial uses. To the contrary, Article II H and Article V (B and C) define beneficial use as including irrigation, municipal and industrial uses. *Environmental Defense Fund v. Morton*, 420 F. Supp. 1037 (D. Mont. 1976).

An industrial water marketing program for the sale of water from the Yellowtail and Boysen Reservoirs does not violate the percentage allocation program in the Yellowstone River Compact. When the river is fully developed the final use must fit the apportionment (Wyoming 80% and Montana 20%), but there is nothing to suggest that development must proceed with one State fully apace with the other nor that the water from any particular project must be apportioned by these percentages. *Environmental Defense Fund, Inc. v. Morton*, 420 F. Supp. 1037 (D. Mont. 1976).

10.—NEPA compliance

Environmental impact statements are required for the Industrial Water Marketing Plan and all option contracts entered into thereunder to sell water from the Yellowtail and Boysen Reservoirs, Missouri River Basin Project, even though the plan and some contracts were executed before January 1, 1970. Both the overall plan and the individual contracts are ongoing programs which require continuing attention and action and must therefore comply with the National Environmental Policy Act even though initiated before its enactment. *Environmental Defense Fund, Inc., v. Andrus*, 596 F.2d 848 (9th Cir. 1979).

The preparation of an environmental impact statement is required in conjunction with both the Industrial Water Marketing Plan and the option contracts entered into thereunder to sell water from the Yellowtail and Boysen Reservoirs for industrial use. Any uncertainty which may exist about the details of subsequent use of the diverted water does not obviate the importance of the decision to divert and the necessity to evaluate the environmental consequences of that decision. Here, there is more than mere "contemplation" of Federal action; there is a developed marketing program and executed option contracts. *Environmental Defense Fund, Inc. v. Andrus*, 596 F.2d 848 (9th Cir. 1979).

Where the Government enters into option contracts for the sale of water for industrial uses from the Yellowtail and Boysen Reservoirs, Missouri River Basin Project, an environmental impact statement must be prepared when the contract is executed and cannot be delayed until the option is exercised. The execution itself constitutes a major Federal action under the National Environmental Policy Act because the Government, by the terms of the contract, thereby enters into an irreversible and irretrievable commitment of the availability of the water. While the details of the option holder's future use of the diverted water may not be known at the time of contract execution, it is at that time that the Government must decide among various potential users and, in so doing, must conjecture as to the possible effects of commitment to one user versus another. *Environmental Defense Fund, Inc. v. Andrus*, 596 F.2d 848 (9th Cir. 1979).

11.—Construction with other laws

The clear language of section 2(b) of the

Fish and Wildlife Coordination Act demonstrates that it applies to "modification or supplementation of plans for previously authorized projects." Hence, as required by section 2(a) of the Act, the Secretary must consult with the appropriate State and Federal agencies before entering into options contracts for the sale of water for industrial uses from the previously completed Boysen and Yellowtail Reservoirs, Missouri River Basin Project. *Environmental Defense Fund, Inc. v. Andrus*, 596 F.2d 848 (9th Cir. 1979).

The Miscellaneous Water Supply Act of 1920 is inapplicable to the sale of water for industrial purposes from the Yellowtail and Boysen Reservoirs of the Missouri River Basin Project. The projects were built as multipurpose projects under sections 1(b) and 9 of the Flood Control Act of 1944 and the Bureau of Reclamation was authorized by the 1944 Act and section 9(c) of the Reclamation Project Act of 1939 to enter into the subject contracts. *Environmental Defense Fund, Inc. v. Morton*, 420 F. Supp. 1037 (D. Mont. 1976), aff'd sub nom. *Environmental Defense Fund, Inc. v. Andrus*, 596 F.2d 848 (9th Cir. 1979).

In contracting to supply water for industrial purposes from the Yellowtail and Boysen Reservoirs of the Missouri River Basin Project the Secretary was not obligated to comply with the Water Supply Act of 1958. Such sale is independently authorized by section 9(c) of the Reclamation Project Act of 1939 and the Water Supply Act expressly declares that it "shall be a alternative to and not a substitute for the provisions of the [1939 Act]." *Environmental Defense Fund, Inc. v. Morton*, 420 F. Supp. 1037 (D. Mont. 1976), aff'd sub nom. *Environmental Defense Fund, Inc. v. Andrus*, 596 F.2d 848 (9th Cir. 1979).

12.—Impairment of irrigation efficiency

In determining whether the sale of water for industrial use from the Yellowtail and Boysen Reservoirs will impair the efficiency of the Missouri River Basin Project, it is clear from section 9(c) of the Reclamation Project Act of 1939 that the only relevant factors are those which relate to the irrigation efficiency of the project. The Secretary is not required to consider the adequacy of the water supply for the irrigation of all lands in a river basin or the State of Montana nor is he obligated to engage in a balancing of all factors related to the use of the water. *Environmental Defense Fund, Inc. v. Morton*, 420 F. Supp. 1037 (D. Neb. 1976), aff'd sub nom. *Environmental Defense Fund, Inc. v. Andrus*, 596 F.2d 848 (9th Cir. 1979).

16. Tort claims

It is clear from section 2680 that, under section 1346(b) of the Federal Tort Claims Act, the Federal Government is immune from suit with regard to exercises of discretion at the project planning level. It is also clear that the award of a 40 million dollar contract to Yellowtail Contractors for the construction of Yellowtail Dam would be an exercise of discretion at the planning level rather than at the operational level so that the United States would be immune from suit based upon alleged negligence in hiring the contractor. *Hamman v. United States*, 267 F. Supp. 411 (D. Mont. 1967).

17. Private rights

The Flood Control Act of 1944 cannot be construed as a statutory grant to water users in the Missouri River Basin of a right to have stored waters from the Yellowtail and Boysen Reservoirs released, without a repayment contract, to augment the stream flow of the Yellowstone River. No language in the Act can be interpreted as creating such rights. Moreover, Reclamation statutes such as section 9(d) of the Reclamation Project Act of 1939 require the Secretary to enter into repayment contracts for the use of project waters. Finally, such interpretation would be contrary to the intent of the excess land requirements of section 46 of the Omnibus Adjustment Act of 1926, and fundamental Reclamation law, which require repayment contracts for water. *Environmental Defense Fund, Inc. v. Morton*, 420 F. Supp. 1037 (D. Mont. 1976), aff'd sub nom. *Environmental Defense Fund, Inc. v. Andrus*, 596 F.2d 848 (9th Cir. 1979).

AMEND CONSULTING ENGINEERS AND ECONOMISTS ON IMPORTANT RECLAMATION WORK ACT

Page 812

[Authority to hire retired Interior personnel.]—*Repealed.*

EXPLANATORY NOTE

Provision Repealed. Section 8 of the Act of September 6, 1966 (Public Law 89-554, 80 Stat. 652) repealed the proviso added to the Act of February 28, 1929 (45 Stat. 1406) by the Act of December 23, 1944 (58 Stat. 915). The 1966 Act does not appear herein.

RIVER AND HARBOR ACT OF 1945

Page 813

Sec. 2. [Projects authorized.]—

*   *   *   *   *

[Snake River Dams.]—

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Explanatory Note

Subsequent Modification and Authorization. Section 164 of the Water Resources Development Act of 1976 (Act of October 22, 1976, Public Law 94–587, 90 Stat. 2917) modified the project for the Snake River, Oregon, Washington, and Idaho by authorizing construction at full Federal expense of a highway bridge connecting the cities of Lewiston, Idaho, and Clarkston, Washington. It also required non-federal interests to enter into certain agreements prior to initiation of construction. Extracts from the 1976 Act, not including section 164, appear in Volume IV in chronological order.

INTERIOR DEPARTMENT APPROPRIATION ACT

Page 830

[Utilization of power revenues.]—Utilization of power revenues: No power revenues on any project shall be distributed as profits, before or after retirement of the project debt, and nothing contained in any previous appropriation Act shall be deemed to have authorized such distribution: *Provided*, That the application of such revenues to the cost of operation, maintenance, and debt service of the irrigation system of the project, or to other purposes in aid of such irrigation system, shall not be construed to be such a distribution; (60 Stat. 366; 16 U.S.C. § 825t)

EXPLANATORY NOTE

Error in the Text of Volume II. The words "of the project, or to other purposes in aid of such irrigation system," were omitted from the proviso following "irrigation system," and preceding "shall". The provision should read as it appears above.

NOTE OF OPINION

2. Use of power revenues

The Act of July 1, 1946 not only makes clear that under subsection I of the Fact Finders' Act power revenues are not to be distributed to individual water users after repayment of the construction costs of the project, it also confirms that revenues subject to disposition under subsection I may be applied to project purposes after project repayment instead of being deposited in the General Treasury as would be required by the Hayden-O'Mahoney Act. The same policy would apply to revenues from grazing lands. Solicitor Melich Opinion, M-36863, 79 I.D. 513 (August 8, 1972), in re Strawberry Valley Project, Utah.

FLOOD CONTROL ACT OF 1946

Pages 832-833

Sec. 10. [Projects authorized.]—

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BOISE RIVER BASIN

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EXPLANATORY NOTE

Subsequent Modification and Authorization. Section 196 of the Water Resources Development Act of 1976 (Public Law 94-587, 90 Stat. 2917) authorized the Secretary of the Army to modify the outlet works at Lucky Peak Dam at a Federal cost not to exceed $4,100,000 to assure maintenance of adequate flows along the Boise River, with the proviso that the provisions of section 102(b) of the Federal Water Pollution Control Act Amendments of 1972 shall apply to such modification. Extracts from the 1976 Act, not including section 196, appear in Volume IV in chronological order.

LEWISTON ORCHARDS PROJECT

Page 836

[Sec. 1. Project authorized.]—

* * * * *

NOTE OF OPINION

1. Rehabilitation and betterment

The Lewiston Orchards Irrigation District is eligible to receive funds under the Rehabilitation and Betterment Act to rehabilitate both its irrigation and domestic water delivery systems. Although the Act itself refers only to irrigation systems, rehabilitation of the domestic water delivery system is nevertheless authorized inasmuch as (1) the domestic water system is an essential accompaniment of the irrigation system and uses the same water supply, (2) the legislative history of the Act speaks in terms of Reclamation projects and not merely irrigation systems, and (3) the Act is remedial in nature and should be liberally construed. This conclusion is, however, narrowly based on the specific circumstances and history of this particular project and does not imply that the Rehabilitation and Betterment Act generally permits funding of rehabilitation work of municipal and industrial systems in Reclamation projects. Memorandum of Assistant Solicitor Mauro to Field Solicitor, Boise, February 10, 1981, as supplemented by Memorandum from Acting Associate Solicitor Elliott to Field Solicitor Boise, June 19, 1981.

FISH AND WILDLIFE CONSERVATION (FISH AND WILDLIFE COORDINATION ACT)

Page 839

[Sec. 1. Purpose—Cooperation with agencies—Surveys and investigations—Donations.]—

* * * * *

NOTE OF OPINION

1. Private right of action

No private right of action arises under the Fish and Wildlife Coordination Act of 1946; thus a challenge to the Bureau of Reclamation's decision to drawdown carryover storage at Clair Engle Lake and diminish releases into the Trinity River because of an area drought must be dismissed even though such action could adversely affect fish habitats in the river. *County of Trinity v. Andrus*, 438 F. Supp. 1368 (E.D. Cal. 1977).

Pages 839-843

Sec. 2. [Consultation required on all Federal and Federally-licensed water impoundments, diversions or other modifications—Reports of Secretary and State agency shall be included with and considered in reports on Federal water resource projects—Modification of projects—Acquisition of lands—Integral part of project cost—Limitations on enhancement measures—Transfer of funds to Fish and Wildlife Service—Estimation of wildlife benefits or losses and costs to be included in project reports—Application to projects—Exemption of small impoundments and land management activities.]—

* * * * *

NOTES OF OPINIONS

Acquisition of lands 3
Private right of action 7
Projects covered 1
Reporting requirements 8

1. Projects covered

The clear language of section 2(b) of the Fish and Wildlife Coordination Act demonstrates that it applies to "modification or supplementation of plans for previously authorized projects." Hence, as required by section 2(a) of the Act, the Secretary must consult with the appropriate State and Federal agencies before entering into options contracts for the sale of water for industrial uses from the previously completed Boysen and Yellowtail Reservoirs, Missouri River Basin Project. *Environmental Defense Fund, Inc. v. Andrus*, 596 F.2d 848 (9th Cir. 1979).

3. Acquisition of lands

In authorizing the Secretary to exchange Columbia Basin Project lands for the purposes of "facilitating project development," section 4(a) of the Columbia Basin Project Act authorizes the Bureau of Reclamation to exchange Federally-owned project lands for privately-owned lands desired for fish and wildlife enhancement purposes, even though fish and wildlife conservation was not a purpose of the project as reauthorized by the Act of March 10, 1943. The combined effect of sections 2(c), 2(g) and 3(c) of the Fish and Wildlife Coordination Act makes fish and wildlife conservation an integral part of a previously authorized water control project if 60 percent of the estimated project construction costs was not obligated as of August 12, 1958, and, as of 1966, only 42 percent of the estimated construction cost of the Columbia Basin Project had been obligated. Memorandum of Acting Associate Solicitor McDowell to Commissioner of Reclamation, May 25, 1977, in re proposed exchange of lands with Carl Ellingsen.

7. Private right of action

As no private right of action arises under sections 2 and 3 of the Fish and Wildlife Coordination Act, nongovernmental plaintiffs cannot challenge the construction and operation of the Tracy Pumping Plant, Central Valley Project, for allegedly failing to comply with the Act. *Sierra Club v. Morton*, 400 F. Supp. 610 (N.D. Cal. 1975), aff'd on other grounds sub nom. *Sierra Club v. Andrus*, 610 F.2d 581 (9th Cir. 1979), cert. granted sub nom. *California v. Sierra Club*, 449 U.S. 818 (1981), reversed and remanded, 451 U.S. 287 (1981).

8. Reporting requirements

Even a good faith attempt to comply with the environmental impact statement requirements of section 102 of the National Environmental Policy Act may be insufficient to satisfy the reporting requirements of the Fish and Wildlife Coordination Act. The latter Act directs that Congress be directly informed of environmental effects of stream modification, a policy which may not be duplicated by the National Environmental Policy Act. Thus, a report under the Coordination Act remains mandatory for the installation of a powerplant at the Navajo Dam, Colorado River Storage Project, which would unquestionably affect wildlife resources by altering the flow rates of the San Juan River. *National Wildlife Federation v. Andrus*, 440 F. Supp. 1245 (D. D.C. 1977).

Pages 843-845

Sec. 3. [Use of land and waters for wildlife purposes in connection with Federal water impoundments, diversions, and other modifications—Plans and administration—Acquisition of lands by Federal construction agencies—Report to Congress—Use of properties acquired—Availability of Federal lands—National forest lands.]—

* * * * *

NOTES OF OPINIONS

Acquisition of lands 1
Private right of action 2

1. Acquisition of lands

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GILA PROJECT

Pages 858-861

EXPLANATORY NOTE

Codification Omitted. The Act of July 30, 1947 (61 Stat. 628) authorizing the Gila Project originally was codified at 43 U.S.C. §§613-613e but was omitted from the 1976 and subsequent editions of the U.S. Code as having limited applicability.

EXTENSION OF SHASTA NATIONAL FOREST

Page 865

* * * * *

EXPLANATORY NOTE

Supplementary Provision: Mineral Development. Section 3 of the Act of September 1, 1949 (Public Law 81–280, 63 Stat. 682) provides that: "The Secretary of the Interior is hereby authorized under general rules and regulations to be prescribed by him to issue leases or permits for the exploration, development, and utilization of the mineral deposits, other than those subject to the provisions of the Act of August 7, 1947 (61 Stat. 913), in those lands added to the Shasta National Forest by the Act of March 19, 1948 (Public Law 449, Eightieth Congress), which were acquired with funds of the United States or lands received in exchange therefor: *Provided*, That any permit or lease of such deposits in lands administered by the Secretary of Agriculture shall be issued only with his consent and subject to such conditions as he may prescribe to insure the adequate utilization of the lands for the purposes set forth in the Act of March 19, 1948: *And provided further*, That all receipts derived from leases or permits issued under the authority of this Act shall be paid into the same funds or accounts in the treasury and shall be distributed in the same manner as prescribed for other receipts from the lands affected by the lease or permit, the intention of this provision being that this Act shall not affect the distribution of receipts pursuant to legislation applicable to such lands." The 1949 Act does not appear herein.

ASSISTANCE TO SCHOOL DISTRICTS, FORT PECK PROJECT

Page 876

[Payments to school districts under regulations by Secretary of the Army—Reimbursement by Secretary of Energy.]—

* * * * *

Explanatory Note

Transfer of Function. Section 302(a) of the Department of Energy Organization Act of 1977 (Act of August 4, 1977, Public Law 95–91, 91 Stat. 578, 42 U.S.C. § 7152(a)) transferred the power marketing functions of the Bureau of Reclamation to the Secretary of Energy. Accordingly, the reimbursement function required by the proviso in the Act of June 3, 1948 is now performed by the Secretary of Energy through the Western Area Power Administration. Extracts from the 1977 Act, including section 302(a), appear in Volume IV in chronological order.

KENNEWICK DIVISION, YAKIMA PROJECT

Page 881

[Sec. 1. Kennewick division and Kennewick division extension authorized—Principal units.]—For the purposes of irrigating lands; of generating, transmitting, and marketing hydroelectric energy; for the preservation and propagation of fish and wildlife; and looking to the completion of the Yakima project, there is hereby authorized to be constructed, operated, and maintained, in accordance with the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto) the Kennewick division and Kennewick division extension of the Yakima project, composed of the following principal units, to wit:

Prosser-Chandler power canal.
Chandler hydroelectric power and hydraulic pumping plant.
Main canal.
Kiona wasteway.
Amon siphon and hydraulic pumping plant.
Amon wasteway.
Lateral system.
Improvements for fish and wildlife.
Kiona siphon.
Re-lift pumping plants. (62 Stat. 382; § 1(a), Act of August 25, 1969, 83 Stat. 106)

EXPLANATORY NOTES

1969 Amendment. Section 1(a) of the Act of August 25, 1969 (Public Law 91–66, 83 Stat. 106) amended section 1 by (a) inserting the words "and Kennewick division extension" after the words "Kennewick division" and (b) adding "Kiona siphon" and "Re-lift pumping plant" to the list of principal units. The 1969 Act appears in Volume IV in chronological order.

Supplementary Provision: Kennewick Extension Delivery Restriction. Section 2 of the Act of August 25, 1969 (Public Law 91–66, 83 Stat. 106) provides that no water shall be delivered for a period of ten years to any water user on the Kennewick division extension for the production on newly irrigated lands of any basic agricultural commodity if in any market year the bulk of the crop is in excess of the normal supply. The 1969 Act appears in Volume IV in chronological order.

Pages 881-882

Sec. 3. [Sale of power—Rates.]—The Secretary of the Interior is authorized to enter into contracts for the sale of electric power and energy not required for project uses, hereinafter termed commercial power and energy, at such rates as in his judgment will produce power revenues which, together with power revenues from all other sales of power and energy, will be at least sufficient to cover (1) an appropriate share of the annual operation and maintenance cost, including reasonable provision for replacements; (2) the return, within not exceeding sixty-six years from the date upon which each feature becomes revenue producing, of an appropriate share of the construction investment properly allocable by the Secretary to commercial power and energy together with interest on the unpaid balance at a rate of not less than 2½ per centum per annum; (3) the return, without interest, within a period not exceeding sixty-six years, and, with respect to each irrigation block, within a period conforming so far as practicable to the period within which water users are required to repay their share of the irrigation costs of that share of the investment found by the Secretary to be properly allocable to irrigation but assigned for return from net power revenues. Costs of the Kennewick division extension allocated to irrigation which are determined by the Secretary to be in excess of the water users' ability to repay within a fifty-year repayment period following a ten-year development period, shall be charged to and returned to the reclamation fund in accordance with the provisions of section 2 of the Act of June 14, 1966 (80 Stat. 200), as amended by section 6 of the Act of September 7, 1966 (80 Stat. 707): *Provided*, That section 5 of this Act shall not be applicable to the revenues derived from the Federal Columbia River power system. Power and energy required for irrigation water pumping for the Kennewick extension shall be made available by the Secretary from the Federal Columbia River power system at charges determined by him. (62 Stat. 382; § 1(b), Act of August 25, 1969, 83 Stat. 106)

EXPLANATORY NOTES

1969 Amendment. Section 1(b) of the Act of August 25, 1969 (Public Law 91-66, 83 Stat. 106) added the last two sentences of section 3. As amended, the Kennewick division extension may receive assistance from the Federal Columbia River power system, as established by section 2 of the Act of June 14, 1966 (80 Stat. 200), as amended by section 6 of the Act of September 7, 1966 (80 Stat. 707). The 1969 Act appears in Volume IV in chronological order.

Transfer of Functions. Section 302(a) of the Department of Energy Organization Act of 1977 (Act of August 4, 1977, Public Law 95-91, 91 Stat. 578) transferred the power marketing functions of the Bureau of Reclamation to the Secretary of Energy. Extracts from the 1977 Act, including section 302(a), appear in Volume IV in chronological order.

Page 882

Sec. 7. [Appropriations authorized.]—

* * * * *

EXPLANATORY NOTE

Supplementary Provision: Additional Appropriation. Section 3 of the Act of August 25, 1969 (Public Law 91-66, 83 Stat. 106) authorized $6,735,000 (January 1969 prices) to be appropriated for the construction of new works associated with the Kennewick division extension. The 1969 Act appears in Volume IV in chronological order.

FEDERAL TORT CLAIMS ACT

Page 885

Sec. 2671. [Definitions.]—

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, member of the National Guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty. (62 Stat. 928; Act of May 24, 1949, 63 Stat. 106; Act of July 18, 1966, 80 Stat. 306; § 1, Act of July 1, 1981, 95 Stat. 1666)

EXPLANATORY NOTE

1981 Amendment. Section 1 of the Act of December 29, 1981 (Public Law 97–124, 95 Stat 1666) amended § 2671 by adding the language concerning members of the National Guard to the definitions of "Employee of the government" and "Acting within the scope of his office or employment". The 1981 Act does not appear herein.

Pages 886-887

Sec. 2674. [Liability of United States.]—

* * * * *

NOTE OF OPINION

4. Independent contractors, inspections

Under the Federal Tort Claims Act, the United States may not be liable for the negligence of an independent contractor. Merely because the Government retained the right to inspect work on the Rye Patch Dam to insure compliance with the construction contract and did, in fact, conduct such inspections, the United States did not thereby assume a duty to employees of the independent contractor to inspect for safety violations and is not liable toward an employee injured through the contractor's allegedly negligent installation of cables holding a raised dam gate. *Lewis v. United States*, 501 F. Supp. 39 (D. Nev. 1980).

Page 887

Sec. 2675. [Disposition by Federal agency as prerequisite; evidence.]—

* * * * *

NOTES OF OPINIONS

1. Exhaustion of administrative remedies

The legislative history of the Teton Dam Disaster Assistance Act demonstrates that section 9(c) was intended to establish the independence of claims under the Act from those which might exist under any other provision of applicable law, and there is no evidence that this provision was designed to waive the filing requirements of § 2675(a) of the Federal Tort Claims Act. Thus, a contractor who was denied recovery for construction delays occasioned by the Teton Dam failure under the Teton Dam Disaster Assistance Act could not pursue those claims in the courts under the Federal Tort Claims Act until he had exhausted his administrative remedies as required by § 2675(a) of the latter Act. *Gordon H. Ball, Inc. v. United States*, 461 F. Supp. 311 (D. Nev. 1978).

Where the construction of the American Falls Dam on the Snake River was delayed because of the Teton Dam failure and the contractor's claim for damages under the Teton Dam Disaster Assistance Act was administratively denied because plaintiff's area of operations fell outside the "major disaster areas" as defined by the regulations, plaintiff could not then bring a claim under the Federal Tort Claims Act without exhausting administrative remedies under § 2675(a) of the Act. Because of differences in the elements of proof required by the two Acts, plaintiff's filing under the Teton Dam Disaster Assistance Act failed to afford the Government the same opportunity to review and settle the claim as it would have if plaintiff had administratively filed under the Federal Tort Claims Act. *Gordon H. Ball, Inc. v. United States*, 461 F. Supp. 311 (D. Nev. 1978).

Pages 888-889

Sec. 2680. [Exceptions.]—

* * * * *

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law. (62 Stat. 984; § 2, Act of March 16, 1974, 88 Stat. 50; 28 U.S.C. § 2680)

EXPLANATORY NOTE

1974 Amendment. Section 2 of the Act of March 16, 1974 (Public Law 93-253, 88 Stat. 50) amended subsection (h) of § 2680 by adding the proviso. The Act does not appear herein.

NOTES OF OPINIONS

Discretionary function exemption 1
Flood damage exclusion 3

1. Discretionary function exemption

It is clear from § 2680 that under § 1346(b) of the Federal Tort Claims Act the Federal Government is immune from suit with regard to exercises of discretion at the project planning level. It is also clear that the award of a

40 million dollar contract to Yellowtail Contractors for the construction of Yellowtail Dam would be an exercise of discretion at the planning level rather than at the operational level so that the United States would be immune from suit based upon alleged negligence in hiring the contractor. *Hamman v. United States*, 267 F. Supp. 411 (D. Mont. 1967).

3. Flood damage exclusion

The United States is not liable for damage from flood waters unless the cause of the flooding was "wholly unrelated" to the purpose of flood control. *Morici Corp. v. United States*, 681 F. 2d 645 (9th Cir. 1982), affirming 491 F. Supp. 466 (E.D. Cal. 1980) (*Morici I*) and reversing 500 F. Supp. 714 (E.D. Cal. 1980) (*Morici II*).

Although section 3(f) of the Teton Dam Disaster Assistance Act of 1976 permits an insurer to exercise "any right of action against the United States to which it may be entitled under any laws for payments made to [insureds]," an action by insurance companies under the Federal Tort Claims Act to recover more than $7,000,000 in claims paid to insureds because of the Teton Dam collapse is barred by 33 U.S.C. § 702c, which maintains the absolute defense of sovereign immunity for flood damages related to flood control projects. Although flood control is not an express purpose of the Teton Basin Project, it is clear from the legislative history that the project was actually intended, at least in part, to control flooding. Also the Teton Dam Disaster was a "flood" within the meaning of § 702c. *Aetna Insurance Co. v. United States*, 628 F.2d 1201 (9th Cir. 1980), cert. denied, 450 U.S. 1025 (1981).

The immunity provided by 33 U.S.C. § 702c applies to seepage waters that percolate through the ground as well as to flooding waters flowing on the surface. This same provision also immunizes the United States from liability for damage caused by floods deriving from the operation of the Central Valley Project, a multi-purpose river project which has as one of its purposes flood control, when the actions giving rise to the damage were in furtherance of any one of the authorized purposes of the project. This immunity extends even to facilities such as the Trinity River Division, which are an integral and essential part of the project even though not specifically intended to further a flood control purpose. Thus, 33 U.S.C. § 702c bars an action under the Federal Tort Claims Act for damages for water seepage caused by an increase in the water level of the Sacramento River resulting from the operations of the Shasta Dam and Reservoir, the Keswick Dam and Reservoir and the Trinity River Division. *Morici Corp. v. United States*, 491 F. Supp. 466 (E.D. Cal. 1980). [Editor's Note: The court's opinion in this case contains a comprehensive discussion of 33 U.S.C. § 702c].

There is no evidence that Congress intended the reimbursable costs of the Central Valley Project to include payments for damages incurred by downstream riparian owners as a result of floods or flood waters. Consequently, 33 U.S.C. § 702c precludes an action under the Federal Tort Claims Act for flood damages caused by the Sacramento River in conjunction with project operations, even though a significant percentage of project costs are reimbursable under Federal Reclamation law. *Morici Corp. v. United States*, 491 F. Supp. 466 (E.D. Cal. 1980).

33 U.S.C. § 702c protects the Government from liability under the Federal Tort Claims Act for flood damages caused by the Sacramento River in connection with Central Valley Project activities not only with regard to flood control operations, but also so long as the action giving rise to the damages was undertaken in furtherance of any one of the project's intended purposes. *Sanborn v. United States*, 453 F. Supp. 651 (E.D. Cal. 1977); accord, *Morici Corp. v. United States*, 491 F. Supp. 466 (E.D. Cal. 1980).

EMERGENCY FUND

Page 891

[Sec. 1. Emergency fund to assure continuous operation of projects and project facilities governed by Reclamation law.]—In order to assure continuous operation of all projects and project facilities governed by the Federal reclamation law (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto), including any project and facilities constructed with funds provided by the Small Reclamation Projects Act (Act of August 6, 1956, 70 Stat. 1044, and Acts amendatory thereof or supplementary thereto) or with funds provided by the Distribution System Loans Act (Act of May 14, 1956, 69 Stat. 244, and Acts amendatory thereof or supplementary thereto), there is hereby authorized to be appropriated from the reclamation fund an emergency fund which shall be available for defraying expenses which the Commissioner of Reclamation determines are required to be incurred because of unusual or emergency conditions. (Stat. 1052; Act of October 1, 1982, 96 Stat. 1185; 43 U.S.C. § 502)

* * * * *

Explanatory Note

1982 Amendment. The Act of October 1, 1982 (Public Law 97-275, 96 Stat. 1185) amended the Emergency Fund Act of 1948 to make that Act applicable to all projects and project facilities governed by Reclamation law, including projects and facilities serving municipal and industrial purposes and projects and facilities constructed with funds provided under the Small Reclamation Projects Act and the Distribution System Loans Act. The 1982 Act appears in Volume IV in chronological order.

Note of Opinion

4. "Unusual or emergency conditions."

Funds provided by this Act are not available to fund the lining and realigning of the T Canal, Newlands Project, as deterioration of the canal is attributable to normal wear and tear over a prolonged period of time. The canal's condition is, therefore, not the result of "unusual or emergency" conditions and while it does increase the amount of water lost in daily use, there is no evidence that an interruption of water services is threatened. Memorandum of Associate Solicitor Leshy to Commissioner, Water and Power Resources Service, December 18, 1979.

ASSISTANCE TO SCHOOL DISTRICTS

Page 893

EXPLANATORY NOTE

Omission in the Text of Volume II. The title number of the U.S. Code was omitted from the third line of the Note of Opinion at the bottom of page 893. The full citation is 20 U.S.C. § 643(c).

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INTERIOR DEPARTMENT APPROPRIATION ACT, 1949

Page 897

[Earned but unpaid amounts not appropriated.]—

* * * * *

EXPLANATORY NOTE

Provision Repeated. A similar provision is contained in each subsequent annual appropriation act through the most recent one reviewed for this publication, the Energy and Water Development Appropriation Act, 1982 (95 Stat. 1140), which was continued for fiscal year 1983 by section 101(f) of the Further Continuing Appropriations Act for Fiscal Year 1983 (96 Stat. 1906).

UPPER COLORADO RIVER BASIN COMPACT

Pages 910-911

ARTICLE III

* * * * *

NOTE OF OPINION

1. Navajo Project

The 34,100 acre-feet a year of Colorado River water to be supplied under the water services contract to the coal-fueled Navajo Project must be charged to the 50,000 acre-feet a year of Upper Basin water that has been apportioned to Arizona by Article III of the Upper Colorado River Basin Compact. The Navajo Tribe may not demand water in excess of the apportionment to satisfy their reserved water rights, as the tribe has agreed to such water use in the plant site lease, has encouraged the project to go forward, and will realize substantial benefit from the project. Solicitor Melich Opinion, 76 I.D. 357 (December 10, 1969).

926-929

AMENDED CONTRACTS, MISCELLANEOUS PROJECTS

Pages 926-929

Sections 2, 4, 5 and 7.

* * * * *

EXPLANATORY NOTE

Note Omitted from Text of Volume II: Supplementary Provision; Certain Contract Costs and Expenses Nonreimbursable. The Act of January 30, 1954 (Public Law 83-289, 68 Stat. 3) provides that all costs and expenses, not to exceed $100,000, incurred by the United States in negotiating and completing contracts with certain irrigation districts, including those with the Willwood, Bitterroot, Kittitas, and Okanogan districts, approved by the Act of May 6, 1949, and in making future determinations under those contracts with respect to the productivity of temporarily unproductive lands, shall be nonreimbursable to the extent such costs and expenses have not been included in the restated repayment obligations of the irrigation districts involved. The 1954 Act appears in Volume II at page 1129.

FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT OF 1949

Pages 956-957

Sec. 3. [Definitions.]—

*   *   *   *   *

(f) The term "foreign excess property"means any excess property located outside the States of the Union, the District of Columbia, Puerto Rico, American Samoa, Guam, the Trust Territory of the Pacific Islands, and the Virgin Islands.

*   *   *   *   *

(Statutory citations omitted; 40 U.S.C. § 472)

EXPLANATORY NOTE

1975 Amendment. The Act of January 2, 1975 (Public Law 93-594, 88 Stat. 1926) amended subsection (f) of section 3 by adding "American Samoa, Guam, the Trust Territory of the Pacific Islands" following "Puerto Rico". The 1975 Act does not appear herein.

Pages 957-958

Sec. 202. [Property utilization.]—(a) Subject to the provisions of paragraph (2) of this subsection, in order to minimize expenditures for property, the Administrator shall prescribe policies and methods to promote the maximum utilization of excess property by executive agencies, and he shall provide for the transfer of excess property among Federal agencies and to the organizations specified in section 109 (f). The Administrator, with the approval of the Director of the Office of Management and Budget, shall prescribe the extent of reimbursement for such transfers of excess property: *Provided*, That reimbursement shall be required of the fair value, as determined by the Administrator, of any excess property transferred whenever net proceeds are requested pursuant to section 204(c) or whenever either the transferor or the transferee agency (or the organizational unit affected) is subject to the Government Corporation Control Act or is an organization specified in section 109(f); and that excess property determined by the Administrator to be suitable for distribution through the supply centers of the General Services Administration shall be retransferred at prices fixed by the Administrator with due regard to prices established in accordance with section 109(b).

(2) The Administrator shall prescribe such procedures as may be necessary in order to transfer without compensation to the Secretary of the Interior excess real property located within the reservation of any group,

band, or tribe of Indians which is recognized as eligible for services by the Bureau of Indian Affairs. Such excess real property shall be held in trust by the Secretary for the benefit and use of the group, band, or tribe of Indians, within whose reservation such excess real property is located: *Provided*, That such transfers of real property within the State of Oklahoma shall be made to the Secretary of the Interior to be held in trust for Oklahoma Indian tribes recognized by the Secretary of the Interior when such real property (1) is located within boundaries of former reservations in Oklahoma as defined by the Secretary of Interior and when such real property was held in trust by the United States for an Indian tribe at the time of acquisition by the United States, or (2) is contiguous to real property presently held in trust by the United States for an Oklahoma Indian tribe and was at any time held in trust by the United States for an Indian tribe.

* * * * *

(Statutory citations omitted; 40 U.S.C. § 483)

EXPLANATORY NOTE

1975 Amendment. The Act of January 2, 1975 (Public Law 93-599, 88 Stat. 1954) amended subsection (a) of section 202 by: redesignating existing subsection (a) as paragraph (1); in paragraph (1) as redesignated, substituting "Subject to the provisions of paragraph (2) of this subsection, in order to minimize" for "In order to minimize"; and adding paragraph (2). The 1975 Act does not appear herein.

Pages 958-960

Sec. 203. [Disposal of surplus property.]—

* * * * *

(f) [Contractor inventories.]—Subject to regulations of the Administrator, any executive agency may authorize any contractor with such agency or subcontractor thereunder to retain or dispose of any contractor inventory.

* * * * *

(j) [Transfers for donation of property to State agencies— State plan of operation—"Public agency" and "State" defined.]—(1) Under such regulations as he may prescribe, the Administrator is authorized in his discretion to transfer, without cost (except for costs of care and handling), any personal property under the control of any executive agency which has been determined to be surplus property to the State agency in each State designated under State law as the agency responsible for the fair and equitable distribution, through donation, of all property transferred in accordance with the provisions of paragraphs (2) and (3) of this subsection. In determining whether the property is to be transferred for donation under this subsection, no distinction shall be made between property capitalized in a working-capital fund established under section 2208 of title 10, United States Code, or any similar fund, and any other property.

* * * * *

(3) Except for surplus personal property transferred pursuant to paragraph (2) of this subsection, the Administrator shall, pursuant to criteria which are based on need and utilization and established after such consultation with State agencies as is feasible, allocate such property among the States in [sic] a fair and equitable basis (taking into account the condition of the property as well as the original acquisition costs thereof), and transfer to the State agency property selected by it for distribution through donation within the State—

(A) to any public agency for use in carrying out or promoting for the residents of a given political area one or more public purposes, such as conservation, economic development, education, parks and recreation, public health, and public safety; or

(B) to nonprofit educational or public health institutions or organizations, such as medical institutions, hospitals, clinics, health centers, schools, colleges, universities, schools for the mentally retarded, schools for the physically handicapped, child care centers, radio and television stations licensed by the Federal Communications Commission as educational radio or educational television stations, museums attended by the public, and libraries serving free all residents of a community, district, State, or region, which are exempt from taxation under section 501 of the Internal Revenue Code of 1954, for purposes of education or public health (including research for any such purpose).

The Administrator, in allocating and transferring property under this paragraph, shall give fair consideration, consistently with the established criteria, to expressions of need and interest on the part of public agencies and other eligible institutions within that State, and shall give special consideration to requests by eligible recipients, transmitted through the State agency, for specific items of property.

* * * * *

(5) As used in this subsection, (A) the term "public agency" means any State, political subdivision thereof (including any unit of local government or economic development district), or any department, agency, instrumentality thereof (including instrumentalities created by compact or other agreement between States or political subdivisions), or any Indian tribe, band, group, pueblo, or community located on a State reservation and (B) the term "State" means the several States, the District of Columbia, the Commonwealth of Puerto Rico, Virgin Islands, Guam, and American Samoa.

(k) [Disposals by Secretary of Education, Secretary of Health and Human Services, Secretary of the Interior, and Secretary of Defense.]—

* * * * *

(3) Without monetary consideration to the United States, the Administrator may convey to any State, political subdivision, instrumentalities thereof, or municipality, all of the right, title, and interest of the United States in and to any surplus real and related personal property which the Secretary of the Interior has determined is suitable and desirable for use as a historic monument, for the benefit of the public. No property shall be determined to be suitable or desirable for use as a historic monument except in conformity with the recommendation of the Advisory Board on National Parks, Historic Sites, Buildings and Monuments established by section 3 of the Act entitled "An Act for the preservation of historic American sites, buildings, objects, and antiquities of national significance, and for other purposes", approved August 21, 1935 (49 Stat. 666), and only so much of any such property shall be so determined to be suitable or desirable for which such use as is necessary for the preservation and proper observation of its historic features.

(A) The Administrator may authorize use of any property conveyed under this subsection or the Surplus Property Act of 1944, as amended, for revenue-producing activities if the Secretary of the Interior (i) determines that such activities are compatible with use of the property for historic monument purposes, (ii) approves the grantee's plan for repair, rehabilitation, restoration, and maintenance of the property, and (iii) approves the grantee's plan for financing repair, rehabilitation, restoration, and maintenance of the property. The Secretary shall not approve a financial plan unless it provides that incomes in excess of costs of repair, rehabilitation, restoration, and maintenance shall be used by the grantee only for public historic preservation, park, or recreational purposes. The Administrator may not authorize any uses under this subsection until the Secretary has examined and approved the accounting and financial procedures used by the grantee. The Secretary may periodically audit the records of the grantee, directly related to the property conveyed.

(B) The deed of conveyance of any surplus real property disposed of under the provisions of this subsection—

(i) shall provide that all such property shall be used and maintained for historical monument purposes in perpetuity, and that in the event that the property ceases to be used or maintained for that purpose, all or any portion of the property shall, in its then existing condition, at the option of the United States, revert to the United States; and

(ii) may contain such additional terms, reservations, restrictions, and conditions as may be determined by the Administrator to be necessary to safeguard the interests of the United States.

(C) "States" as used in this subsection, includes the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States.

(4) Subject to the disapproval of the Administrator within thirty days after notice to him of any action to be taken under this subsection, except with respect to personal property transferred pursuant to subsection (j) of this section—

* * * * *

(C) the Secretary of the Interior, in the case of property transferred pursuant to the Surplus Property Act of 1944, as amended, and pursuant to this Act, to States, political subdivisions, and instrumentalities thereof, and municipalities for use as a public park, public recreational area, or historic monument for the benefit of the public;

* * * * *

is authorized and directed—

(i) to determine and enforce compliance with the terms, conditions, reservations, and restrictions contained in any instrument by which such transfer was made;

(ii) to reform, correct, or amend any such instrument by the execution of a corrective, reformative or amendatory instrument where necessary to correct such instrument or to conform such transfer to the requirements of applicable law; and

(iii) to (I) grant releases from any of the terms, conditions, reservations, and restrictions contained in, and (II) convey, quitclaim, or release to the transferee or other eligible user any right or interest reserved to the United States by, any instrument by which such transfer was made, if he determines that the property so transferred no longer serves the purpose for which it was transferred, or that such release, conveyance, or quitclaim deed will not prevent accomplishment of the purpose for which such property was so transferred: *Provided*, That any such release, conveyance, or quitclaim deed may be granted on, or made subject to, such terms and conditions as he shall deem necessary to protect or advance the interests of the United States.

* * * * *

(m) [Possession of abandoned or unclaimed property on Government premises—Disposal—Claims by former owners.]—The Administrator is authorized to take possession of abandoned and other unclaimed property on premises owned or leased by the Government, to determine when title thereto vested in the United States, and to utilize, transfer or otherwise dispose of such property. Former owners of such property upon proper claim filled within three years from the date of vesting of title in the United States shall be paid the proceeds realized from the disposition of such property or, if the property is used or transferred, the fair value therefor as of the time title was vested in the United States as determined by the Administrator, less in either case the costs incident to the care and handling of such property as determined by the Administrator.

(n) [Cooperative agreements with State agencies.]—For the purpose of carrying into effect the provisions of subsection (j) of this section, the Administrator or the head of any Federal agency designated by the Administrator, and, with respect to subsection (k)(1) of this section, the Secretary of Education, the Secretary of Health and Human Services, or the head of any Federal agency designated by the Secretary, are authorized to enter into cooperative agreements with State surplus property distribution agencies designated in conformity with subsection (j) of this section. Such cooperative agreements may provide for utilization by such Federal agency, with or without payment or reimbursement, of the property, facilities, personnel, and services of the State agency in carrying out any such program, and for making available to such State agency, with or without payment or reimbursement, property, facilities, personnel, or services of such Federal agency in connection with such utilization. Payment or reimbursement, if any, from the State agency shall be credited to the fund or appropriation against which charges would be made if no payment or reimbursement were received. In addition, under such cooperative agreements and subject to such other conditions as may be imposed by the Administrator, or with respect to subsection (k)(1) of this section by the Secretary of Education or the Secretary of Health and Human Services, any surplus property transferred to the State agency for distribution pursuant to subsection (j)(3) of this section may be retained by the State agency for use in performing its functions. Unless otherwise directed by the Administrator, title to property so retained shall vest in the state agency.

(o) [Annual reports to Congress by Administrator.]The Administrator with respect to personal property donated under subsection (j) of this section, and the head of each executive agency disposing of real property under subsection (k) of this section, shall submit during the calendar quarter following the close of each fiscal year a report to the Senate (or to the Secretary of the Senate if the Senate is not in session) and to the House of Representatives (or to the Clerk of the House if the House is not in session) showing the acquisition cost of all personal property so donated and of all real property so disposed of during the preceding fiscal year. Such reports shall also show donations and transfers of property according to State, and may include such other information and recommendations as the Administrator or other executive agency head concerned deems appropriate. (Statutory citations omitted; 40 U.S.C. § 484)

EXPLANATORY NOTE

Miscellaneous Amendments. It is not deemed necessary to explain in these Notes the several amendments included in the text above.

NOTES OF OPINIONS

1. Relationship with other laws

Since the enactment of the Federal Property Act of June 30, 1949, the provisions of the Act of February 2, 1911, are no longer available to the Bureau of Reclamation for the purpose of disposing of surplus acquired lands. However, pursuant to General Accounting Office (GAO) regulations and practice, GAO is advised that the proceeds are to be covered into the reclamation fund and credited to the project. Memorandum of Acting Solicitor Robison to Field Solicitor, Amarillo, November 8, 1972, in re disposition of miscellaneous revenues from Rio Grande Project.

* * * * *

Sec. 602. [Congress, departments, agencies, corporations, and persons exempted from provisions.]—The authority conferred by this Act shall be in addition and paramount to any authority conferred by any other law and shall not be subject to the provisions of any law inconsistent herewith, except that sections 205(b) and 206(c) shall not be applicable to any Government corporation or agency which is subject to the Government Corporation Control Act.

Nothing in this act shall impair or affect any authority of—

* * * * *

(2) any executive agency with respect to any phase (including, but not limited to, procurement, storage, transportation, processing, and disposal) of any program conducted for purposes of resale, price support, grants to farmers, stabilization, transfer to foreign governments, or foreign aid, relief, or rehabilitation: *Provided*, That the agency carrying out such program shall, to the maximum extent practicable, consistent with the fulfillment of the purposes of the program and the effective and efficient conduct of its business, coordinate its operations with the requirements of said chapters and the policies and regulations prescribed pursuant thereto;

* * * * *

(20) The Secretary of the Interior with respect to procurement for program operations under the Bonneville Project Act of 1937 (50 Stat. 731), as amended.

* * * * *

(63 Stat. 401; § 12(a), (g), Act of August 10, 1949, 63 Stat. 591; §§ 6, 7, 8, Act of September 5, 1950 64 Stat. 583, 590; § 1406, Act of August 23, 1958, 72 Stat. 808; § 303(b), Act of May 24, 1962, 76 Stat. 78; § 6, Act of November 8, 1965, 79 Stat. 1303; §§ 3(e), 6(c)(1), Act of October 15, 1966, 80 Stat. 931; § 7, Act of May 15, 1967, 81 Stat. 22; § 6(m)(2), Act of August 12, 1970, 84 Stat. 782; § 15(4), Act of August 30, 1974, 88 Stat. 800; § 203(c), Act of August 15, 1979, 93 Stat. 399; § 10(b), Act of October 10, 1979, 93 Stat 652; § 12(13), Act of August 6, 1981, 95 Stat. 154; § 303(b), Act of August 24, 1982, 96 Stat. 291; 40 U.S.C. § 474)

EXPLANATORY NOTE

Omission in the Text of Volume II. The extracts from section 602, formerly section 502, that appear above were omitted from the extracts from the 1949 Act included in Volume II.

WEBER BASIN PROJECT

Pages 965-967

NOTES OF OPINIONS

Easements and rights-of-way 3-5
  Approval of water users 3
  Disposition of revenues 4
Liability for damages 6

3. Easements and rights-of-way—Approval of water users

The proviso in section 10(b) of the Reclamation Project Act of 1939, which requires the approval of the water users' organization for easements or rights-of-way of more than twenty-five years duration, was intended to protect the water users by preventing the United States from allowing permanent improvements on or across project works which would add to or impair the operation and maintenance of the project. This proviso does not, however, grant the Weber River Water Users Association any control over the Secretary's grant of a right-of-way to the State of Utah across lands in the Weber Basin Project for construction of interstate highway I-80 as the proposed highway is above the reach of the Echo Reservoir and will have no effect on project maintenance and operations. Memorandum of Acting Associate Solicitor Morthland to Regional Solicitor, Salt Lake City, May 1, 1969.

4. Disposition of revenues

Revenues received by the United States, holder of legal title to Weber Basin Project lands, from the State of Utah for an easement across project lands for construction of interstate highway I-80 can be paid only to the United States and cannot be paid directly to the Weber River Water Users Association, who will eventually assume ownership of the project, as such revenues are not within the exceptions provided by subsections I and J of the Fact Finders' Act. Such revenues may, however, be paid into the reclamation fund and be credited to the project so as to be available to the Association for future project work. Memorandum of Acting Associate Solicitor Morthland to Regional Solicitor, Salt Lake City, May 1, 1969, as supplemented by Letter of Solicitor Melich to Mr. Earl Harris, May 28, 1969.

6. Liability for damages

Where, pursuant to a Reclamation contract, the United States Government, and not the Weber Basin Water Conservancy District, constructed and operated the Willard Gravity Canal as part of the Weber Basin Project, the function of the District was for practical purposes merely that of a collection agent or fiscal agent and because it had no control over construction or operation of the facility it cannot be held responsible for injury or damage resulting from the canal. *White v. Weber Basin Conservancy District*, 23 Utah 2d 133, 459 P.2d 429 (1969).

REHABILITATION AND BETTERMENT ACT

Page 969

[Sec. 1. Rehabilitation and betterment of Federal Reclamation projects, including small reclamation projects—Return of costs as determined by Secretary—Interest—Determination not effective until 60 days after submission to Congressional Committees—Definitions—Performance of work by contract or force account.]—Expenditures of funds hereafter specifically appropriated for rehabilitation and betterment of any project constructed under authority of the Small Reclamation Projects Act (Act of August 6, 1956, 70 Stat. 1044, and Acts amendatory thereof and supplementary thereto) and of irrigation systems on projects governed by the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto), shall be made only after the organizations concerned shall have obligated themselves for the return thereof, in installments fixed in accordance with their ability to pay, as determined by the Secretary of the Interior in the light of their outstanding repayment obligations, and which shall, to the fullest practicable extent, be scheduled for return with their construction charge installments or otherwise scheduled as he shall determine: *Provided,* That repayment of such loans made for small reclamation projects shall include interest in accordance with the provisions of said Small Reclamation Projects Act. No such determination of the Secretary of the Interior shall become effective until the expiration of sixty days after it has been submitted to the Committee on Energy and Natural Resources of the Senate and the Committee on Interior and Insular Affairs of the House of Representatives; except that, any such determination may become effective prior to the expiration of such sixty days in any case in which each such committee approves an earlier date and notifies the Secretary, in writing, of such approval: *Provided,* That when Congress is not in session the Secretary's determination, if accompanied by a finding by the Secretary that substantial hardship to the water users concerned or substantial further injury to the project works will result, shall become effective when the chairman and ranking minority member of each such committee shall file with the Secretary their written approval of said findings. The term "rehabilitation and betterment", as used in this section, shall mean maintenance, including replacements, which cannot be financed currently, as otherwise contemplated by the Federal reclamation laws in the case of operation and maintenance costs, but shall not include construction, the costs of which are returnable, in whole or in part, through "construction charges" as that term is defined in section 2(d) of the Reclamation Project Act of 1939 (53 Stat. 1187). Such rehabilitation and betterment work may be performed by contract, by force-account, or, notwithstanding any other law and subject to such reasonable terms and conditions as the Secretary of the Interior shall deem appropriate for the protection of the United States, by contract entered into with the organization concerned whereby such organization shall perform such work. (63 Stat. 724; Act of March 3, 1950, 64 Stat. 11; Act of October 3, 1975, 89 Stat. 485; 43 U.S.C. §504)

EXPLANATORY NOTES

1975 Amendment. The Act of October 3, 1975 (Public Law 94-102, 89 Stat. 485) amended the Rehabilitation and Betterment Act of 1949 by providing for coverage of projects constructed under the authority of the Small Reclamation Projects Act and by providing that repayment of loans made for such projects shall include interest in accordance with the provisions of that Act. The 1975 Act appears in Volume IV in chronological order.

Supplementary Provision: Nonreimbursable Costs. The Act of October 29, 1971 (Public Law 92-149, 85 Stat. 416) provides that the costs of studies for rehabilitation and betterment of existing projects relating to work for which repayment contracts have not been executed prior to October 29, 1971 shall be nonreimbursable. The 1971 Act appears in Volume IV in chronological order.

Pages 970-971

Sec. 2. [Act as a supplement to the Federal Reclamation laws.]—

NOTES OF OPINIONS

Construction with other laws 8
Excess land laws 9
Maintenance vs. construction costs 4
Private projects 2
Projects, eligibility of 7

2. Private projects

The privately developed Settlers Irrigation District does not become eligible for rehabilitation and betterment funding merely by purchasing water from or storage capacity in Reclamation reservoirs (Arrowrock and Anderson Ranch) and agreeing to acreage limitations and assuming a repayment obligation, as the Act was intended to apply only to irrigation systems constructed by the United States and which the United States is authorized to operate and maintain. Memorandum of Acting Associate Solicitor McDowell to Commissioner of Reclamation, June 6, 1977.

4. Maintenance vs. construction costs

Permanently increasing the height of the Rye Patch Dam by three feet in order to eliminate unsafe twelve-inch flashboards, intermittently used to increase reservoir storage capacity, falls within the Act's definition of "rehabilitation and betterment" as such work will increase service to irrigated areas but will not increase the number of acres served by the project. Costs of such work would not be returnable to the United States through "construction charges," as defined in section 2(d) of the Reclamation Project Act of 1939. Memorandum of Associate Solicitor Garner, to Assistant Secretary, Land and Water Resources, June 17, 1975, in re proposed contract with the Pershing County Water Conservation District—Humboldt Project, Nevada.

7. Projects, eligibility of

The Lewiston Orchards Project is eligible to receive funds under the Rehabilitation and Betterment Act to rehabilitate both its irrigation and domestic water delivery systems. Although the Act itself refers only to irrigation systems, rehabilitation of the domestic water delivery system is nevertheless authorized inasmuch as (1) Congress authorized the Project substantially in accordance with a Bureau of Reclamation report which described the domestic water system as "an essential accompaniment of the irrigation system [which] would use the same water supply," (2) the legislative history of the Act speaks in terms of Reclamation projects and not merely irrigation systems, and (3) the Act is remedial in nature and should be liberally construed. This conclusion is, however, narrowly based on the specific circumstances and history of this particular project and does not imply that the Rehabilitation and Betterment Act generally permits funding of rehabilitation work of municipal and industrial systems in Reclamation projects. Memorandum of Assistant Solicitor Mauro to Field solicitor, Boise, February 10, 1981, as supplemented by Memorandum from Acting Associate Solicitor Elliott to Field Solicitor Boise, June 19, 1981.

Funding authorized under the Reclamation Safety of Dams Act is not available for rehabilitation of dams constructed under the Small Reclamation Projects Act as both the language of the Act and the House Report clearly indicate that such funding is authorized only for dams actually constructed by the Water and Power Resources Service. Facilities constructed under the Small Reclamation Projects Act may, however, obtain loans for project improvement or repair under either the Small Reclamation Projects Act or the Rehabilitation and Betterment Act. Memorandum of Associate Solicitor Leshy to Commissioner, Water and Power Resources Service, April 29, 1980.

There is no authority under section 101(h) of the Colorado River Basin Salinity Control Act for the United States to share the cost of rehabilitation of six laterals on the Wellton-Mohawk Irrigation and Drainage District canal system. Authorizations under section 101(h) are expressly limited to assistance to water users and the types of system improvements specifically identified by that section demonstrate that it applies to on-farm improvements rather than to improvements on the canal system itself. This conclusion is not affected by language in section 101(b) (1) (5) authorizing irrigation efficiency improvements to minimize return flows, as the specific treatment in section 101(h) of irrigation efficiency improvements is a limitation on the foregoing general statement. Loans for the improvements the District has proposed may, however, be obtained under the Rehabilitation and Betterment Act. Memorandum of Acting Solicitor Ferguson to Commissioner of Reclamation, February 11, 1977.

The replacement of an antiquated and expensive-to-maintain distribution system serving the "Old Land" unit of the Kennewick Division of the Yakima Project complies with the Act even though project water will be used for watering trees and shrubs and not for conventional agriculture on two-thirds of the unit. The "Old Lands" unit is an integral part of the irrigation system in that: (1) it is entirely within the Kennewick Irrigation District, which has full responsibility for the operation and control of the unit's irrigation works; (2) responsibility for payment of the District's obligations, including payment for the proposed rehabilitation and betterment, vests in the District and ultimately on all lands in the District; and (3) savings in operation, maintenance, and pumping costs, as well as water savings resulting from the rehabilitation and betterment, will accrue to all District lands. Even assuming the unit to be a separate system, it must be considered an irrigation system in that: (1) the approximately one-third of the unit's lands still devoted to ordinary irrigated agriculture will receive irrigation benefits from the rehabilitation program; and (2) even after rehabilitation and betterment the water delivery system will not bear the ordinary characteristics of domestic and municipal water supply as the water is not potable and is available only during the irrigation season, at times when water is being delivered for irrigation, and only at delivery points located for former irrigation purposes. Memorandum of Acting Associate Solicitor Miron to Assistant Secretary, Water and Power Development, May 16, 1968.

Where an irrigation district has undergone urbanization so that a portion of the district's water is no longer being used for conventional agriculture, whether the system in question remains an irrigation system and therefore eligible for funds under the Rehabilitation and Betterment Act must be determined on a case-by-case basis after review of all relevant facts. Memorandum of Acting Associate Solicitor Miron to Assistant Secretary, Water and Power Development, May 16, 1968

8. Construction with other laws

The phrase "notwithstanding any other law" in the Drainage and Minor Construction Act and in the last sentence of section 1 of the Rehabilitation and Betterment Act exempts the Secretary of the Interior, in contracting with a water user's organization for the performance of rehabilitation and betterment work, from restrictions contained in general provisions of the law. Thus, the wage and hour provisions established by the Copeland Act and the Contract Work Standards Act can be omitted from Reclamation repayment contracts executed under the former Acts as a matter of discretion granted to the Secretary by those Acts. Memorandum of Acting Associate Solicitor Davis to Commissioner of Reclamation, July 18, 1968.

The Contract Work Hours Act does not apply to work under rehabilitation and betterment loans unless the works to be rehabilitated factually or legally take on the character of public works. Memorandum of Acting Associate Solicitor Miron, February 7, 1968, in re proposed contract with Solano Irrigation District.

9. Excess land laws

A landowner would be freed of the excess land law where a repayment contract, approved by Congress, specified that when the per acre construction charge allocated to the lands shall have been repaid, the land shall be relieved from the acreage limitation. The fact that the landowner is obligated to continue to pay rehabilitation and betterment expenses after payout of construction charges does not subject the lands to the excess land law. The words "construction charges' as used in the repayment contract do not include the costs of rehabilitation and betterment. The Rehabilitation and Betterment Act of 1949 (63 Stat. 724) limits rehabilitation and betterment to maintenance and replacement costs that cannot be currently financed; it does not include project construction costs. Memorandum of Associate Solicitor Leshy to Commissioner of Reclamation and Regional Solicitor, Denver, September 14, 1978, in re payout, Gering-Fort Laramie Irrigation District.

The exemption from the excess land law, provided pursuant to repayment contracts with Goshen, Gering, and Fort Laramie Irrigation Districts authorized by the Act of July 17, 1952 (66 Stat. 754), which becomes effective upon payment of outstanding construction charges, is not lost by the fact that subsequently two of the districts assumed rehabilitation and betterment loans pursuant to the Act of October 7, 1949, as amended, 63 Stat. 724, 43 U.S.C. 504. Memorandum of Associate Solicitor Leshy to Commissioner of Reclamation, September 22, 1977, in re North Platte Project-Procedures to be used on payout of construction and R&B obligations on excess lands.

INTERIOR DEPARTMENT APPROPRIATION ACT, 1950

Pages 974-975

[Continuing fund, Southwestern Power Administration.]—

* * * * *

Explanatory Note

Point of Order. On June 26, 1972, the Chairman of the Committee of the Whole House on the State of the Union ruled that a proviso in a pending appropriation bill permitting the expenditure of an indefinite sum from the Continuing Fund, Southwestern Power Administration, to defray emergency expenses, would change existing law and therefore was out of order. Congressional Record, H 6069-70, June 26, 1972 (daily edition).

Note of Opinion

2. Power purchase and line rental

The Southwestern Power Administration is not authorized under section 5 of the Flood Control Act of 1944 or the continuing fund statute to enter into a forty-year contract to purchase the entire output of a steam generating plant to be built by its Arkansas Electric Cooperative Corporation. *Arkansas Electric Coop. Corp. v. Arkansas-Missouri Power Co.*, 255 S.W. 2d 674 (Ark. 1953). [Editor's Note: This holding is included only for historical interest.]

AMERICAN RIVER BASIN DEVELOPMENT

Page 980

Sec. 4. [Operation of works to be coordinated and integrated with existing and future features of the Central Valley project.]—

* * * * *

1. Judicial review

The standard in section 4 that Folsom Dam will be operated "in such manner as will effectuate the fullest and most economic utilization of the land and water resources of the Central Valley project of California for the widest possible public benefit" is too imprecise to provide law to apply for judicial review of the Secretary of the Interior's refusal to allocate nonwithdrawable power to Santa Clara. *City of Santa Clara, California v. Andrus,* 572 F.2d 660, 668 fn. 4 (9th Cir. 1978), cert. denied sub nom. *Pacific Gas and Electric Co. v. City of Santa Clara,* 439 U.S. 859 (1978).

FARM TENANT ACT LOANS TO ENTRYMEN

Page 981

[Sec. 1. Loans by Secretary of Agriculture to homestead or desertland entrymen and others.]—The Secretary of Agriculture is authorized to make a loan or loans for any purpose authorized by and in accordance with the terms of the Bankhead-Jones Farm Tenant Act, as amended, or the Act of August 28, 1937, as amended, to any person eligible for assistance under said Acts who has made or makes a homestead or desertland entry on public land or who has contracted for or contracts for the purchase of other land of the United States in a reclamation project pursuant to the applicable provisions of the homestead and reclamation laws. Any such loans required by the Secretary of Agriculture or by law to be secured by a real-estate mortgage may be secured by a mortgage contract which shall create a lien against the land in favor of the United States acting through the Secretary of Agriculture and any patent thereafter issued shall recite the existence of such lien. The first installment for the repayment of any such loan or any other loan made under the Bankhead-Jones Farm Tenant Act, as amended, or the Act of August 28, 1937, as amended, to the owner of a newly irrigated farm in a reclamation project or to an entryman under the desertland laws, may be deferred for a period of not to exceed two years from the date of the first advance under such loan. (63 Stat. 883; §602, Act of August 30, 1972, 86 Stat. 675; 7 U.S.C. §1006a)

EXPLANATORY NOTE

1972 Amendment. Section 602 of the Act of August 30, 1972 (Public Law 92-419, 86 Stat. 675) amended section 1 by adding "or desertland" to the first sentence and by adding "or to an entryman under the desertland laws" to the third sentence. The 1972 Act does not appear herein.

984-986

AMENDED CONTRACTS, MISCELLANEOUS PROJECTS

Pages 984-986

BELLE FOURCHE PROJECT, SOUTH DAKOTA

Sec. 2.

* * * * *

SHOSHONE PROJECT, WYOMING

Sec. 3.

* * * * *

EXPLANATORY NOTE

Note Omitted from Text of Volume II: Supplementary Provision; Certain Contract Costs and Expenses Nonreimbursable. The Act of January 30, 1954 (Public Law 83-289, 68 Stat. 3) provides that all costs and expenses, not to exceed $100,000, incurred by the United States in negotiating and completing contracts with certain irrigation districts, including those with the Belle Fourche and Deaver districts approved by the Act of October 27, 1949, and in making future determinations under those contracts with respect to the productivity of temporarily unproductive lands, shall be nonreimbursable to the extent such costs and expenses have not been included in the restated repayment obligations of the irrigation districts involved. The 1954 Act appears in Volume II at page 1129.

EKLUTNA PROJECT

Pages 1010-1011

[Sec. 1. Secretary authorized to construct Eklutna project—Interest at rate of 2½ per centum—Disposition of minerals discovered—Reservation of waters.]—

* * * * *

EXPLANATORY NOTES

Transfer of Functions. Section 302(a) of the Department of Energy Organization Act of 1977 (Public Law 95-91, Act of August 4, 1977, 91 Stat. 565) transferred to the Secretary of Energy the authority of the Secretary of the Interior to operate and maintain the Eklutna Project and to market the power therefrom. Extracts from the 1977 Act, including section 302(a), appear in Volume IV in chronological order.

Supplementary Provision: Rehabilitation of Earthquake Damage. The Act of September 26, 1968 (Public Law 90-523, 82 Stat. 875) provides that the total sums expended by the Secretary of the Interior in rehabilitation of the Eklutna project from damage caused by the earthquake of March 27, 1964, less the difference between the actual cost of the new dam and the estimated cost of rehabilating the old dam, shall be nonreimbursable and not subject to the provisions of the second sentence of section 1 of the Act of July 31, 1950, as amended, provided that nonreimbursable expenditures shall not exceed $2,805,437. The 1968 Act appears in Volume IV in chronological order.

NOTES OF OPINIONS

Applicability of Reclamation law 2
Investigations and studies 3

2. Applicability of Reclamation law

Although the Bureau of Reclamation did for some time operate the Eklutna project, Eklutna is not a Reclamation project and is not subject to Reclamation law. Therefore, the Alaska Power Administration may not avail itself of the Contributed Funds Act of March 4, 1921 (41 Stat. 1404) to accept funds from the State of Alaska for work done in relocating an Alaska Power Administration transmission line. Memorandum of Associate Solicitor Morthland, May 19, 1971.

3. Investigations and studies

The provisions in the Act of August 9, 1955 (69 Stat. 618) limiting appropriations for water resources investigations in Alaska to $250,000 per year do not apply to general investigations and planning and resource studies of the Alaska Power Administration which are justified under other laws, such as the Eklutna Project authorization of July 31, 1950 (64 Stat. 382), as amended, the Snettisham project authorization in section 204 of the Flood Control Act of 1962 (76 Stat. 1193), section 5 of the Flood Control Act of 1944 (58 Stat. 890), and the Public Land Administration Act of 1961 (43 U.S.C. §1362). Acting Solicitor Weinberg Opinion, M-36727, March 27, 1968.

Page 1011

Sec. 2. [Disposition of power developed—Revenues to miscellaneous receipts of the Treasury—Continuing fund.]—

* * * * *

1012 EKLUTNA PROJECT

Explanatory Notes

Error in the Text of Volume II. The date that appears in the Explanatory Note following section 2 should be August "13" rather than August "31".

Transfer of Functions. Section 301(b) of the Department of Energy Organization Act of 1977 (Public Law 95-91, Act of August 4, 1977, 91 Stat. 565) transferred to the Secretary of Energy the function of the Federal Power Commission to confirm and approve rates for the sale of power from the Eklutna Project. Extracts from the 1977 Act, including section 301(b), appear in volume IV in chronological order.

Notes of Opinions

2. Rates

It is well within the Secretary of Energy's broad discretion under the Department of Energy Organization Act to delegate to the Assistant Secretary the authority to confirm and approve rates on an interim basis and to delegate or assign to the Federal Energy Regulatory Commission the authority to confirm and approve rates on a final basis. Memorandum of General Counsel Coleman, October 14, 1978, in re proposed delegation to the Federal Energy Regulatory Commission of rate confirmation authority for the Department of Energy's power marketing agencies.

Pursuant to section 301(b) of the Department of Energy Organization Act, the confirmation and approval authority of the Federal Power Commission for Federal power marketing rates is vested in the Secretary of Energy. Memorandum of General Counsel Coleman, October 14, 1978, in re proposed delegation to the Federal Energy Regulatory Commission of rate confirmation authority for the Department of Energy's power marketing agencies.

Page 1012

Explanatory Note

Alaska Power Administration. The Alaska Power Administration was established by the Secretary of the Interior by Secretarial Order No. 2900 of June 16, 1967 to operate and maintain the Eklutna and Snettisham projects, conduct resource studies, and carry out other functions in Alaska.

GENERAL APPROPRIATION ACT, 1951 (INTERIOR DEPARTMENT APPROPRIATION ACT, 1951)

Pages 1020-1021

GENERAL INVESTIGATIONS

[General provisions.]—

* * * * *

Explanatory Note

Provision Repeated. A similar provision, appropriating funds for "engineering and economic investigations of proposed Federal reclamation projects and studies of water conservation and development plans and activities preliminary to the reconstruction, rehabilitation and betterment, financial adjustment, or extension of existing projects," is contained in each subsequent annual appropriation act through the most recent one reviewed for this publication, the Energy and Water Development Appropriation Act, 1982 (95 Stat. 1138), which was continued for fiscal year 1983 by section 101(f) of the Further Continuing Appropriations Act for Fiscal Year 1983 (96 Stat. 1906).

Page 1021

CONSTRUCTION AND REHABILITATION

[General provisions.]—

* * * * *

Explanatory Note

Provision Repeated. A similar provision is contained in each subsequent annual appropriation act through the most recent one reviewed for this publication, the Energy and Water Development Appropriation Act, 1982 (95 Stat. 1138), which was continued for fiscal year 1983 by section 101(f) of the Further Continuing Appropriations Act for Fiscal Year 1983 (96 Stat. 1906), except that H.R. 12928 of the 95th Congress, which was adopted by the Continuing Appropriations Act, 1979 (92 Stat. 1603), added the words "for reclamation use" after "transmission facilities" in the parenthetical phrase. This was changed in 1980 to "for Water and Power Resources Service use" and in 1981 to "for Bureau of Reclamation use" The Energy and Water Development Appropriation Act, 1981 (Act of October 1, 1980, 94 Stat. 1339), and subsequent acts also omitted the words "authorized reclamation" before "projects". The provision currently reads: "For construction and rehabilitation of projects and parts thereof (including power transmission facilities for Bureau of Reclamation use) and for other related activities as authorized by law".

Pages 1021-1022

OPERATION AND MAINTENANCE

[General provisions.]—

* * * * *

EXPLANATORY NOTE

Provision repeated. These provisions are contained in each subsequent annual appropriation act through the most recent one reviewed for this publication, the Energy and Water Development Appropriation Act, 1982 (95 Stat. 1139), which was continued for fiscal year 1983 by section 101(f) of the Further Continuing Appropriations Act for Fiscal Year 1983 (96 Stat. 1906), except that the Act of December 26, 1975 (89 Stat. 1041) and subsequent acts change the last clause to make advances available until expended.

Page 1022

SPECIAL FUNDS

[Reclamation fund—Colorado River Dam fund—Colorado River development fund.]—

* * * * *

EXPLANATORY NOTE

Provision Repeated. This same paragraph is contained in each subsequent annual appropriation act through the most recent one reviewed for this publication, the Energy and Water Development Appropriation Act, 1982 (95 Stat. 1140), which was continued for fiscal year 1983 by section 101(f) of the Further Continuing Appropriations Act for Fiscal Year 1983 (96 Stat. 1906), except that the 1982 Act omits the reference in the last clause to the head "Operation and Maintenance".

Pages 1022-1023

ADMINISTRATIVE PROVISIONS

[Interstate compact representatives.]—

* * * * *

EXPLANATORY NOTE

Provision Repeated. The same provision is contained in each subsequent annual appropriation act through the most recent one reviewed for this publication, the Energy and Water Development Appropriation Act, 1982 (95 Stat. 1140), which was continued for fiscal year 1983 by section 101(f) of the Further Continuing Appropriations Act for Fiscal Year 1983 (96 Stat. 1906).

Page 1023

[General administrative, reconnaissance, basin surveys, and general engineering and research expenses nonreimbursable.]—

* * * * *

EXPLANATORY NOTE

Provision Repeated. A paragraph appropriating funds for "necessary expenses of general administration and related functions in the offices of the Commissioner of the Bureau of Reclamation . . . to be nonreimbursable pursuant to the Act of April 19, 1945 (43

U.S.C. 377)" is contained in each subsequent annual appropriation act through the most recent one reviewed for this publication, the Energy and Water Development Appropriation Act, 1982 (95 Stat. 1139), which was continued for fiscal year 1983 by section 101(f) of the Further Continuing Appropriations Act for Fiscal Year 1983 (96 Stat. 1906).

Pages 1023-1024

[Reimbursable funds.]—

*   *   *   *   *

EXPLANATORY NOTE

Provision Repeated. This same paragraph is contained in each subsequent annual appropriation act through the most recent one reviewed for this publication, the Energy and Water Development Appropriation Act, 1982 (95 Stat. 1140), which was continued for fiscal year 1983 by section 101(f) of the Further Continuing Appropriations Act for Fiscal Year 1983 (96 Stat. 1906).

Page 1024

[Restriction on use of funds for lands in arrears in payments.]—

*   *   *   *   *

EXPLANATORY NOTE

Provision Repeated. This same paragraph is contained in each subsequent annual appropriation act through the most recent one reviewed for this publication, the Energy and Water Development Appropriation Act, 1982 (95 Stat. 1140), which was continued for fiscal year 1983 by section 101(f) of the Further Continuing Appropriations Act for Fiscal Year 1983 (96 Stat. 1906).

Page 1026

Sec. 105. [Emergency repairs.]—

*   *   *   *   *

EXPLANATORY NOTE

Provision Repeated. The same provision is contained in each subsequent annual appropriation act through the most recent one reviewed for this publication, the Energy and Water Development Appropriation Act, 1982 (95 Stat. 1141), which was continued for fiscal year 1983 by section 101(f) of the Further Continuing Appropriations Act for Fiscal Year 1983 (96 Stat. 1906).

Page 1026

Sec. 106. [Forest or range fires.]—

*   *   *   *   *

EXPLANATORY NOTE

Provision Repeated. A similar paragraph is contained in each subsequent annual appropriation act through the most recent one reviewed for this publication, the Energy and Water Development Appropriation Act, 1982 (95 Stat. 1141), which was continued for fiscal year 1983 by section 101(f) of the Further Continuing Appropriations Act for Fiscal Year 1983 (96 Stat. 1906).

SACRAMENTO VALLEY CANALS

Page 1032

[Sec. 1. Central Valley Project reauthorized.]—

* * * * *

EXPLANATORY NOTE

Error in the Text of Volume II. In the second line of section 1, "October 26, 1937" should read "August 26, 1937".

Pages 1032-1033

Sec. 2. [Features included.]—The features herein authorized shall include an irrigation canal, generally known as the Tehama-Colusa Conduit, to be located on the west side of the Sacramento River and equipped with all necessary pumping plants and appurtenant works, beginning at the Sacramento River near Red Bluff, California, and extending southerly through Tehama, Glenn, and Colusa Counties so as to permit the most effective irrigation of the irrigable lands lying in the vicinity of said canal and supply water for industrial, domestic, and other beneficial uses for these lands in Tehama, Glenn, and Colusa Counties or such alternate canals and pumping plants as the Commissioner of Reclamation and Secretary of the Interior may deem necessary to accomplish the aforesaid purposes. Notwithstanding the provisions of section 5 of this Act, the Secretary of the Interior is authorized to provide sufficient extra capacity and elevation in the Tehama-Colusa Canal to enable future water service to Yolo, Solano, Lake, and Napa Counties for irrigation and other purposes, and to treat the cost of providing such extra capacity as a deferred obligation. The deferred obligation is to be paid under arrangements to be made at such time as the works to serve the additional areas may be authorized as an extension of the Central Valley project. In the event such works are not authorized, the deferred obligation is to be paid from other revenues of the Central Valley project.

The features herein authorized shall also include an irrigation canal, generally known as the Chico Canal, to be located on the east side of the Sacramento River and equipped with all necessary pumping plants and other appurtenant works, beginning at the Sacramento River near Vina, California, and extending through Tehama and Butte Counties to a point near Durham, California, so as to permit the most effective irrigation of the lands lying in the vicinity of said canal and supply water for industrial, domestic, and other beneficial uses for these lands lying within Tehama and Butte Counties or such alternate canals and pumping plants as the Commissioner of Reclamation and the Secretary of the Interior may deem necessary to accomplish the aforesaid purposes. (64 Stat. 1036; Act of August 19, 1967, 81 Stat. 167)

SACRAMENTO VALLEY CANALS *1032-1033*

EXPLANATORY NOTE

1967 Amendment. The Act of August 19, 1967 (Public Law 90-65, 81 Stat. 167) amended section 2 by adding the last three sentences in the first paragraph. The 1967 Act appears in Volume IV in chronological order.

NOTES OF OPINION

1. Tehama-Colusa Canal, authorized service area

The authorized service area of the Tehama-Colusa Canal is not limited to the 147,000 acres of irrigable land identified in the feasibility report required by section 5, which was submitted to Congress in 1953, as that section governs only the expenditure of funds and not the overall project authorization. It is evident from the legislative history that Congress contemplated service to up to 250,000 acres so long as irrigation of such land was feasible and the land was located in the vicinity of the conduit in Tehama, Glenn and Colusa Counties. Memorandum of Associate Solicitor Leshy and Acting Regional Solicitor Dauber to Commissioner, Water and Power Resources Service, June 20, 1980.

Because the express language of the Act only authorizes the Tehama-Colusa Canal to service irrigable lands in "Tehama, Glenn and Colusa Counties," lands in Dunnigan Water District in Yolo County are not within the authorized service area even though the District executed a water service contract in 1963 and a distribution system repayment contract in 1975 for the delivery of canal water and notwithstanding the fact that the maps in the feasibility report show the canal's service area extending 5½ miles into Yolo County. Memorandum of Associate Solicitor Leshy and Acting Regional Solicitor Dauber to Commissioner, Water and Power Resources Service, June 20, 1980.

DISASTER RELIEF ACT OF 1950

Pages 1043-1047

An act to authorize Federal assistance to States and local governments in major disasters, and for other purposes. (Act of September 30, 1950, Public Law 81–875, 64 Stat. 1109)—*Repealed.*

Explanatory Note

1970 Repeal. Section 302 of the Disaster Relief Act of 1970 (Act of December 31, 1970 Public Law 91–606, 84 Stat. 1759) repealed the 1950 Act in full. A discussion of the provisions of the 1970 Act appears in an Explanatory Note following the extracts from the Disaster Relief Act of 1974 (Act of May 22, 1974, Public Law 93–288, 88 Stat. 143), which appear in Volume IV in chronological order.

INTERIOR DEPARTMENT APPROPRIATION ACT, 1952

Page 1054

[Keating amendment—Restriction against transmission facilities in areas served by wheeling contracts.]—

* * * * *

EXPLANATORY NOTE

Provision Repeated. The Keating Amendment was contained in each subsequent annual appropriation act through the Act of September 25, 1979 (93 Stat. 444). It was not continued in appropriation acts for the Western Area Power Administration.

Page 1055

ADMINISTRATIVE PROVISIONS

[Archeological investigation and recovery.]—

* * * * *

EXPLANATORY NOTE

Provision Repeated. The same provision is contained in each subsequent annual appropriation act through the most recent one reviewed for this publication, the Energy and Water Development Appropriation Act, 1982 (95 Stat. 1140), which was continued for fiscal year 1983 by section 101(f) of the Further Continuing Appropriations Act for Fiscal Year 1983 (96 Stat. 1906).

YELLOWSTONE RIVER COMPACT

Pages 1062-1063

ARTICLE II

*   *   *   *   *

NOTE OF OPINION

1. Industrial water marketing program

Nothing in the Yellowstone River Compact was intended to restrict the amount of water the signatory States could use in the Big Horn River for industrial purposes so as to preclude a marketing program for the sale of water from the Yellowtail and Boysen Reservoirs for industrial uses. To the contrary, Article II H and Article V (B and C) define beneficial use as including irrigation, municipal and industrial uses. *Environmental Defense Fund v. Morton*, 420 F. Supp. 1037 (D. Mont. 1976).

Pages 1064-1066

ARTICLE V

*   *   *   *   *

NOTE OF OPINION

1. Industrial water marketing program

Nothing in the Yellowstone River Compact was intended to restrict the amount of water the signatory States could use in the Big Horn River for industrial purposes so as to preclude a marketing program for the sale of water from the Yellowtail and Boysen Reservoirs for industrial uses. To the contrary, Article II H and Article V (B and C) define beneficial use as including irrigation, municipal and industrial uses. *Environmental Defense Fund v. Morton*, 420 F. Supp. 1037 (D. Mont. 1976).

An industrial water marketing program for the sale of water from the Yellowtail and Boysen Reservoirs does not violate the percentage allocation program in the Yellowstone River Compact. When the river is fully developed the final use must fit the apportionment (Wyoming 80% and Montana 20%), but there is nothing to suggest that development must proceed with one State fully apace with the other, nor to suggest that the water from any particular project must be apportioned by these percentages. *Environmental Defense Fund, Inc. v. Morton*, 420 F. Supp. 1037 (D. Mont. 1976).

SALINE WATER RESEARCH

Pages 1087-1090

An act to provide for research into and development of practical means for the economical production, from sea or other saline waters, of water suitable for agriculture, industrial, municipal, and other beneficial consumptive uses, and for other purposes. (Act of July 3, 1952, ch.568, 66 Stat. 328)—*Repealed.*

EXPLANATORY NOTES

1971 Repeal and 1971 and 1978 Replacements. Section 11 of the Act of July 29, 1971 (Public Law 92–60, 85 Stat. 163) repealed the 1952 Act, as amended, in full. The 1971 Act, as amended, was in turn repealed in full by section 410(a) of the Act of October 17, 1978 (Public Law 95–467, 92 Stat. 1316). Extracts from the 1978 Act appear in Volume IV in chronological order. A summary of the provisions of the 1971 Act is included as an annotation to the 1978 Act.

1967 Amendments. The Act of June 24, 1967 (Public Law 90–30, 81 Stat. 78) amended section 8 to increase appropriation authorizations to $105,782,000 and to decrease additional sums authorized to be appropriated to $169,218,000; amended section 2(b) to permit test bed testing, to require reports to Congressional committees on test bed components and plants costing more than $1,000,000, and to provide that the five demonstration plants authorized by the Act of September 2, 1958 shall be regarded as test beds subject to the 1952 Act; and added a new section 9 giving a short title of "Saline Water Conversion Act" to the Act. For legislative history of the 1967 Act, see Public Law 90–30 in the 90th Congress; H.R. Rept. No. 209 on H.R. 6133; and S. Rept. No. 219.

INTERIOR DEPARTMENT APPROPRIATION ACT, 1953

Page 1093

[Savage Rapids Dam.]—

* * * * *

EXPLANATORY NOTE

Supplementary Provision: Improvement of Fish Way. Title XII of the Reclamation Development Act of 1974 (Act of October 27, 1974, Public Law 93–493, 88 Stat. 1486) authorizes the Secretary of the Interior to construct an improved anadromous fish passage at the Savage Rapids Dam. The Grants Pass Irrigation District is responsible for operation and maintenance of the facility, and the appropriation of $851,000 (April 1974 price levels) authorized for the construction is nonreimbursable. The 1974 Act appears in Volume IV in chronological order.

STATE, JUSTICE, COMMERCE AND THE JUDICIARY APPROPRIATION ACT, 1953

Page 1096

[Anzalduas Dam—Repayment of Costs.]—

* * * * *

EXPLANATORY NOTE

Provision Repeated. This proviso is contained in each subsequent annual State Department appropriation act through the most recent one reviewed for this publication. See 97 Stat. 1094.

Pages 1097-1098

Sec. 208. [McCarran Amendment—Joinder of United States as defendant in water rights suits.]—

* * * * *

NOTES OF OPINIONS

Abstention doctrine 4
Actions consented to 5-10
  "Adjudication" 5
  Generally 6
  "River system" 7

4. Abstention doctrine

The McCarran Amendment did not repeal the jurisdiction of the United States District Courts under 28 U.S.C § 1345 to hear a suit instituted by the United States against some 1,000 water users seeking declaration of the Government's rights, including reserved Indian rights, to waters in certain rivers and their tributaries located in Colorado's Division 7. There is concurrent State and Federal jurisdiction. However, where, immediately after the filing of the suit, a proceeding was commenced in the State court for Division 7 for the purpose of adjudicating all of the Government's claims, both State and Federal, it was appropriate for the District Court to dismiss the suit. Although the doctrine of abstention does not require dismissal, dismissal was appropriate in view of the continuance of single continuous proceedings under Colorado law for adjudication of water rights, the absence of previous water rights suits in the District Court, the large number of defendants, the 300-mile distance between the District Court and the court in Division 7, and the existing participation of the Government in Division 4, 5, and 6 proceedings. *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), reversing *United States v. Akin*, 504 F.2d 115 (10th Cir. 1974).

5. Actions consented to—"Adjudication"

The type of adjudication contemplated by section 208(a) of the Act of July 10, 1952 is broad enough to encompass proceedings under the Colorado Water Rights Determination and Administration Act of 1969 in which adjudications, held on a monthly basis before a water rights referee, determine only those water rights for which an application has been filed in a particular month and make all rights confirmed under the new procedure junior to those previously awarded. Such adjudications reach all claims, perhaps month by month, but inclusively in the totality. Should prior adjudicated rights conflict with reserved rights of the United States, such issues are Federal questions and eligible for Supreme Court review. *United States v. District Court for Water Division No. 5*, 401 U.S. 527 (1971).

Although the type of adjudication contemplated by section 208(a) of the Act of July 10, 1952 is a "general" adjudication of water rights, the section cannot be read so narrowly as to deny the United States' consent to a supplemental adjudication of water rights by the State of Colorado under Colo. Rev. Stat. Ann. § 148-9-7, which determines only the rights acquired since the last adjudication of the particular water district. Even though the owners of previously decreed rights, which might conflict with earlier Federal reserved rights, may not be before the Court, decisions involving conflicts between previously decreed rights and reserved rights of the United States present Federal questions which are subject to review by the Supreme Court. *United States v. District Court for Eagle County*, 401 U.S. 520 (1971).

6.—Generally

Where the court is asked not only to adjudicate the rights of all the parties and the United States as they relate to the water which the Government has acquired for the operation of the San Luis Unit, Central Valley Project, but also to delineate, with some particularity, the applicable laws and regulations by which the Bureau of Reclamation must administer the San Luis Unit and the waters acquired by the United States for that purpose, the joinder of the United States is authorized by the second clause of the first sentence of the McCarran Act, even though all claimants to water from a given stream are not defendants. *Barcellos & Wolfsen, Inc. v. Westlands Water District*, 491 F. Supp. 263 (E.D. Cal. 1980).

7.—"River system"

The consent given by clause 1 in the first sentence of section 208(a) of the Act of July 10, 1952 is, by its own terms, all inclusive, and thus the phrase "rights to the use of water of a river system" is broad enough to embrace "received" waters as well as waters acquired pursuant to State law. Consequently, section 208 permits the United States to be joined as a party in a supplemental water adjudication, undertaken pursuant to Colorado law, to adjudicate the rights to the waters of the Eagle River reserved in connection with the White River National Forest. *United States v. District Court for Eagle County*, 401 U.S. 520 (1971).

The term "river system," as employed by section 208(a) of the Act of July 10, 1952, is not so broad that it encompasses all of the waters of an entire river basin, like the Colorado River. Rather, the "river system" must be read as embracing one within the particular State's jurisdiction. Therefore, this section gives consent to join the United States in an action brought by the Colorado River Water Conservancy District, pursuant to Colorado law, for a supplemental adjudication of the rights to the waters of Water District 37, where the Eagle River is a tributary of the Colorado River, and Water District 37 is a Colorado entity encompassing all Colorado lands irrigated by water of the Eagle and its tributaries. *United States v. District Court for Eagle County*, 401 U.S. 520 (1971).

AMENDED CONTRACTS, NORTH PLATTE PROJECT

Page 1106

[Sec. 1. Approval of contracts with Gering and Fort Laramie Irrigation District, Goshen Irrigation District and Pathfinder Irrigation District.]—

* * * * *

NOTES OF OPINION

1. Excess land laws, payout

The exemption from the excess land law provided pursuant to repayment contracts with the Goshen and Gering and Fort Laramie Irrigation Districts authorized by the Act of July 17, 1952 (66 Stat. 754), which becomes effective upon payment of outstanding construction charges, is not lost by the fact that subsequently two of the districts assumed rehabilitation and betterment loans pursuant to the Act of October 7, 1949, as amended (63 Stat. 724, 43 U.S.C. § 504). Memorandum of Associate Solicitor Leshy to Commissioner of Reclamation, September 22, 1977, in re North Platte Project-Procedures to be used on payout of construction and rehabilitation and betterment obligations on excess lands.

A landowner would be freed of the excess land law where a repayment contract, approved by Congress, specified that when the per acre construction charge allocated to the lands shall have been repaid, the land shall be relieved from the acreage limitation. The fact that the landowner is obligated to continue to pay rehabilitation and betterment expenses after payout of construction charges does not subject the lands to the excess land law. The words "construction charges" as used in the repayment contract do not include the costs of rehabilitation and betterment. The Rehabilitation and Betterment Act of 1949 (63 Stat. 724) limits rehabilitation and betterment to maintenance and replacement costs that cannot be currently financed; it does not include project construction costs. Memorandum of Associate Solicitor Leshy to Commissioner of Reclamation and Regional Solicitor, Denver, September 14, 1978, in re payout, Gering-Fort Laramie Irrigation District.

INTERIOR DEPARTMENT APPROPRIATION ACT, 1954

Page 1115

[Soil survey and land classification required.]—

* * * * *

NOTES OF OPINION

1. Certification

The soil survey and land classification certification required by the Act must be completed prior to the initiation of actual project construction but need not be completed either before appropriation and authorization of funds for the project or before expenditure of appropriated construction funds for advance planning. The Bureau may, in its discretion, make the required certification before initiating advance planning activities if paid for out of appropriated construction funds, which are reimbursable. Memorandum of Associate Solicitor Leshy to Commissioner of Reclamation, October 11, 1979.

Lands outside a project area authorized by Congress cannot be added to the project area through the soil survey and land classification certification requirement of the 1954 Act. Memorandum of Associate Solicitor Leshy to Commissioner of Reclamation, October 11, 1979.

MARKETING OF POWER FROM FALCON DAM

Page 1139

[Sec. 1. Falcon and Amistad Dams—Transmission and disposition of electric energy—Rate schedules—Preference.]—

* * * * *

Explanatory Note

Transfer of Functions. Section 301(b) of the Department of Energy Organization Act of 1977 (Public Law 95–91, Act of August 4, 1977, 91 Stat. 565) transferred to the Secretary of Energy the function of the Federal Power Commission to confirm and approve rates for the sale of power from Falcon and Amistad Dams. Section 302(a) of that Act transferred to the Secretary of Energy the authority of the Secretary of the Interior to market power from those Dams. Extracts from the 1977 Act, including Sections 301(b) and 302(a), appear in Volume IV in chronological order.

Notes of Opinion

1. Rates

Pursuant to Section 301(b) of the Department of Energy Organization Act, the confirmation and approval authority of the Federal Power Commission for Federal power marketing rates is vested in the Secretary of Energy. Memorandum of General Counsel Coleman, October 14, 1978, in re proposed delegation to the Federal Energy Regulatory Commission of rate confirmation authority for the Department of Energy's power marketing agencies.

It is well within the Secretary of Energy's broad discretion under the Department of Energy Organization Act to delegate to the Assistant Secretary the authority to confirm and approve rates on an interim basis and to delegate or assign to the Federal Energy Regulatory Commission the authority to confirm and approve rates on a final basis. Memorandum of General Counsel Coleman, October 14, 1978, in re proposed delegation to the Federal Energy Regulatory Commission of rate confirmation authority for the Department of Energy's power marketing agencies.

GLENDO UNIT, MISSOURI RIVER BASIN PROJECT

Pages 1148-1149

EXPLANATORY NOTE

Supplementary Provision: Road Reconstruction. Title IX of the Reclamation Development Act of 1974 (Act of October 27, 1974, Public Law 93–493, 88 Stat. 1486) authorized the Secretary of the Interior to relocate, reconstruct, and rehabilitate the road that was initially relocated in connection with the construction of Glendo Dam and Reservoir to provide a safe, durable, two-lane highway for public use. An appropriation of $284,000 (January 1974 price levels) was authorized for the road work. The Act appears in Volume IV in chronological order.

FOSTER CREEK DIVISION, CHIEF JOSEPH DAM PROJECT

Page 1151

Sec. 2. [Repayment period—Irrigators' payment capacity—Financial assistance to irrigators from power revenues.]—

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EXPLANATORY NOTE

Note Omitted from Text of Volume II: Supplementary Provisions. Section 3 of the Act of May 5, 1958 (Public Law 85-393, 72 Stat. 104) makes this section applicable to the Greater Wenatchee Division, and section 2 of the Act of September 18, 1964 (Public Law 88-599, 78 Stat. 955) makes it applicable to the Whitestone Coulee Unit, of the Chief Joseph Dam project. Both sections also define the term "construction costs" as used herein to include certain irrigation, operation, and maintenance costs during the development period. The sections from the 1958 and 1964 Acts appear in Volume II at page 1416 and in Volume III at page 1803, respectively.

SANTA MARGARITA PROJECT

Page 1161

Sec. 7. [Reports to Congress]—*Repealed.*

EXPLANATORY NOTE

Section Repealed. Section 1(2) of the Act of January 2, 1975 (Public Law 93-608, 88 Stat. 1967) repealed section 7. Extracts from the 1975 Act, including section 1(2), appear in Volume IV in chronological order.

WATERSHED PROTECTION AND FLOOD PREVENTION ACT

Page 1164

[Sec. 1. Congressional intent—Federal cooperation with States and local organizations.]—Erosion, floodwater, and sediment damages in the watersheds of the rivers and streams of the United States, causing loss of life and damage to property, constitute a menace to the national welfare; and it is the sense of Congress that the Federal Government should cooperate with States and their political subdivisions, soil or water conservation districts, flood prevention or control districts, and other local public agencies for the purpose of preventing such damages, of furthering the conservation, development, utilization, and disposal of water, and the conservation and utilization of land and thereby of preserving, protecting, and improving the Nation's land and water resources and the quality of the environment. (68 Stat. 666; § 201(a), Act of August 30, 1972, 86 Stat. 667; 16 U.S.C. § 1001)

EXPLANATORY NOTE

1972 Amendment. Section 201 of the Act of August 30, 1972 (Public Law 92-419, 86 Stat. 667) amended section 1 by adding the language concerning conservation and utilization of land, improvement of land and water resources, and quality of the environment. The 1972 Act does not appear herein.

Pages 1164-1165

Sec. 2. [Definitions.]—For the purposes of this Act, the following terms shall mean:

The "Secretary"—the Secretary of Agriculture of the United States.

"Works of improvement"—any undertaking for—

(1) flood prevention (including structural and land treatment measures),

(2) the conservation, development, utilization, and disposal of water, or

(3) the conservation and proper utilization of land,

in watershed or subwatershed area not exceeding two hundred and fifty thousand acres and not including any single structure which provides more than twelve thousand five hundred acre-feet of floodwater detention capacity, and more than twenty-five thousand acre-feet of total capacity. No appropriation shall be made for any plan involving an estimated Federal contribution to construction costs in excess of $5,000,000, or which includes any structure which provides more than twenty-five hundred acre-feet of total capacity unless such plan has been approved by resolutions adopted by the appropriate committees of the Senate and House of Representatives: *Provided*, That in the case of any plan involving no single structure providing more than 4,000 acre-feet of total capacity the appropriate committees shall be the Committee on Agriculture, Nutrition, and Forestry of the Senate and the Committee on Agriculture of the House of Representatives and in the case of any plan involving any single structure of more than 4,000 acre-feet of total capacity the appropriate committees shall be the Committee on Environment and Public Works of the Senate and the Committee on Public Works and Transportation of the House of Representatives, respectively. A number of such subwatersheds when they are component parts of a larger watershed may be planned together when the local sponsoring organizations so desire.

"Local organization"—any State, political subdivision thereof, soil or water conservation district, flood prevention or control district, or combinations thereof, or any other agency having authority under State law to carry out, maintain and operate the works of improvement; or any irrigation or reservoir company, water users' association, or similar organization having such authority and not being operated for profit that may be approved by the Secretary; or any Indian tribe or tribal organization, as defined in section 450b of title 25 [of the U.S. Code], having authority under Federal, State, or Indian tribal law to carry out, maintain, and operate the works of improvement. (68 Stat. 666; § 1(a), Act of August 7, 1956, 70 Stat. 1088; Act of August 30, 1961, 75 Stat. 408; Act of November 8, 1965, 79 Stat. 1300; Act of August 30, 1972, 86 Stat. 667; § 1506(a), Act of September 29, 1977, 91 Stat. 1022; § 1512, Act of December 22, 1981, 95 Stat. 1332, 1333; 16 U.S.C. § 1002)

EXPLANATORY NOTES

1981 Amendment. Section 1512 of the Act of December 22, 1981 (Public Law 97–98, 95 Stat. 1332, 1333) amended section 2 by substituting "$5,000,000" for "$1,000,000" in the definition of "works of improvement" and expanded the definition of "local organization" to include any Indian tribe or tribal organization having authority under Federal, State, or Indian tribal law to carry out, maintain, and operate works of improvement. The 1981 Act does not appear herein.

1977 amendment. Section 1506(a) of the Act of September 29, 1977 (Public Law 95–113, 91 Stat. 1022) amended section 2 by substituting "$1,000,000" for "$250,000". The 1972 Act does not appear herein.

1972 Amendment. Section 201(b) of the Act of August 30, 1972 (Public Law 92–419, 86 Stat. 667) amended section 2 by expanding the definition of "works of improvement" to include any undertaking for the conservation and proper utilization of land. The 1972 Act does not appear herein.

Page 1165

Sec. 3. [Assistance to local organizations.]—In order to assist local organizations in preparing and carrying out plans for works of improvement, the Secretary is authorized, upon application of local organizations if such application has been submitted to, and not disapproved within 45 days by, the State agency having supervisory responsibility over programs provided for in this chapter, or by the Governor if there is no State agency having such responsibility—

(1) to conduct such investigations and surveys as may be necessary to prepare plans for works of improvement;

(2) to prepare plans and estimates required for adequate engineering evaluation;

(3) to make allocations of costs to the various purposes to show the basis of such allocations and to determine whether benefits exceed costs;

(4) to cooperate and enter into agreements with and to furnish financial and other assistance to local organizations: *Provided*, That, for the land treatment measures, the Federal assistance shall not exceed the rate of assistance for similar practices under existing national programs;

(5) to obtain the cooperation and assistance of other Federal agencies in carrying out the purposes of this section;

(6) to enter into agreements with landowners, operators, and occupiers, individually or collectively, based on conservation plans of such landowners, operators, and occupiers which are developed in cooperation with and approved by the soil and water conservation district in which the land described in the agreement is situated, to be carried out on such land during a period of not to exceed ten years, providing for changes in cropping systems and land uses and for the installation of soil and water conservation practices and measures needed to conserve and develop the soil, water, woodland, wildlife, energy, and recreation resources of lands within the area included in plans for works of improvement, as provided for in such plans, including watershed or subwatershed work plans in connection with the eleven watershed improvement programs authorized by section 13 of the Act of December 22, 1944 (58 Stat. 887), as amended and supplemented. Applications for assistance in developing such conservation plans shall be made in writing to the soil and water conservation district involved, and the proposed agreement shall be reviewed by such district. In return for such agreements by landowners, operators, and occupiers the Secretary shall agree to share the costs of carrying out those practices and measures set forth in the agreement for which he determines that cost sharing is appropriate and in the public interest. The portion of such costs, including labor, to be shared shall be that part which the Secretary determines is appropriate and in the public interest for the carrying out of the practices and measures set forth in the agreement, except that the Federal assistance shall not exceed the rate of assistance for similar practices and measures under existing national programs. The Secretary may terminate any agreement with a landowner, operator, or occupier by mutual agreement if the Secretary determines that such termination would be in the public interest, and may agree to such modifications of agreements, previously entered into hereunder, as he deems desirable to carry out the purposes of this paragraph or to facilitate the practical administration of the agreements provided for herein. Notwithstanding any other provision of law, the Secretary, to the extent he deems it desirable to carry out the purposes of this paragraph, may provide in any agreement hereunder for (1) preservation for a period not to exceed the period covered by the agreement and an equal period thereafter of the cropland, crop acreage, and allotment history applicable to land covered by the agreement for the purpose of any Federal program

under which such history is used as a basis for an allotment or other limitation on the production of any crop; or (2) surrender of any such history and allotments. (68 Stat. 666; § 1(b), Act of August 7, 1956, 70 Stat. 1088, § 201(c), Act of August 30, 1972, 86 Stat. 667; § 1512, Act of December 22, 1981, 95 Stat. 1333; 16 U.S.C. § 1003)

Explanatory Notes

1981 Amendment. Section 1512 of the Act of December 22, 1981 (Public Law 97–98, 95 Stat. 1333) amended section 3 by adding to paragraph (6) the reference to energy in the enumeration of the various aspects of lands to be conserved and developed within areas included under plans for works of improvement. The 1981 Act does not appear herein.

1972 Amendment. Section 201(c) of the Act of August 30, 1972 (Public Law 92–419, 86 Stat. 667) amended section 3 by adding paragraph (6). The 1972 Act does not appear herein.

Pages 1165-1168

Sec. 4. [Conditions for Federal assistance—Fish and wildlife and recreational development—Local organizations' responsibilities—Secretary's assistance.]—The Secretary shall require as a condition to providing Federal assistance for the installation of works of improvement that local organizations shall—

(1) acquire, or with respect to interests in land to be acquired by condemnation provide assurances satisfactory to the Secretary that they will acquire, without cost to the Federal Government from funds appropriated for the purposes of this Act, such land, easements, or rights-of-way as will be needed in connection with works of improvement installed with Federal assistance: *Provided*, That when a local organization agrees to operate and maintain any reservoir or other area included in a plan for public fish and wildlife or recreational development, the Secretary shall be authorized to bear not to exceed one-half of the costs of (a) the land, easements, or rights-of-way acquired or to be acquired by the local organization for such reservoir or other area, and (b) minimum basic facilities needed for public health and safety, access to, and use of such reservoir or other area for such purposes: *Provided further*, That the Secretary shall be authorized to participate in recreational development in any watershed project only to the extent that the need therefor is demonstrated in accordance with standards established by him taking into account the anticipated man-days of use of the projected recreational development and giving consideration to the availability within the region of existing water-based outdoor recreational developments: *Provided further*, That the Secretary shall be authorized to participate in not more than one recreational development in a watershed project containing less than seventy-five thousand acres, or two such developments in a project containing between seventy-five thousand and one hundred and fifty thousand acres, or three such developments in projects exceeding one hundred and fifty thousand acres: *Provided further*, That when the Secretary and a local organization have agreed that the immediate acquisition

by the local organization of land, easements, or right-of-way is advisable for the preservation of sites for works of improvement included in a plan from encroachment by residential, commercial, industrial, or other development, the Secretary shall be authorized to advance to the local organization from funds appropriated for construction of works of improvement the amounts required for the acquisition of such land, easements or rights-of-way; and, except where such costs are to be borne by the Secretary, such advance shall be repaid by the local organization, with interest, prior to construction of the works of improvement, for credit to such construction funds: *Provided further*, That the Secretary shall be authorized to bear an amount not to exceed one-half of the costs of the land, easements, or rights-of-way acquired or to be acquired by the local organization for mitigation of fish and wildlife habitat losses, and that such acquisition is not limited to the confines of the watershed project boundaries;

(2) assume (A) such proportionate share, as is determined by the Secretary to be equitable in consideration of national needs and assistance authorized for similar purposes under other Federal programs, of the costs of installing any works of improvement, involving Federal assistance (excluding engineering costs), which is applicable to the agricultural phases of the conservation, development, utilization, and disposal of water or for fish and wildlife development, recreational development, ground water recharge, water quality management, or the conservation and proper utilization of land: *Provided*, That works of improvement for water quality management shall consist primarily of water storage capacity in reservoirs for regulation of streamflow, except that any such storage and water releases shall not be provided as a substitute for adequate treatment or other methods of controlling waste at the source, and shall be consistent with standards and regulations adopted by the Water Resources Council on Federal cost sharing for water quality management, and (B) all of the cost of installing any portion of such works applicable to other purposes except that any part of the construction cost (including engineering costs) applicable to flood prevention and features relating thereto shall be borne by the Federal Government and paid for by the Secretary out of funds appropriated for the purposes of this Act: *Provided*, That in addition to and without limitation on the authority of the Secretary to make loans or advancements under section 8, the Secretary may pay for any storage of water for present or anticipated future demands or needs for municipal or industrial water included in any reservoir structure constructed or modified under the provisions of this Act as hereinafter provided: *Provided further*, That the cost of water storage to meet future demands may not exceed 30 per centum of the total estimated cost of such reservoir structure and the local organization shall give reasonable assurances, and there is evidence, that such demands for the use of such storage will be made within a period of time which will permit repayment within the life of the reservoir structure of the cost of such storage: *Provided further*, That the Secretary shall determine prior to initiation of

construction or modification of any reservoir structure including such water supply storage that there are adequate assurances by the local organization or by an agency of the State having authority to give such assurances, that the Secretary will be reimbursed the cost of water supply storage for anticipated future demands, and that the local organization will pay not less than 50 per centum of the cost of storage for present water supply demands: *And provided further*, That the cost to be borne by the local organization for anticipated future demands may be repaid within the life of the reservoir structure but in no event to exceed fifty years after the reservoir structure is first used for the storage of water for anticipated future water supply demands, except that (1) no reimbursement of the cost of such water supply storage for anticipated future demands need be made until such supply is first used, and (2) no interest shall be charged on the cost of such water-supply storage for anticipated future demands until such supply is first used, but in no case shall the interest-free period exceed ten years. The interest rate used for purposes of computing the interest on the unpaid balance shall be determined in accordance with the provisions of section 8;

(3) make arrangements satisfactory to the Secretary for defraying costs of operating and maintaining such works of improvement, in accordance with regulations presented by the Secretary of Agriculture;

(4) acquire, or provide assurance that landowners or water users have acquired, such water rights, pursuant to State law, as may be needed in the installation and operation of the work of improvement;

(5) obtain agreements to carry out recommended soil conservation measures and proper farm plans from owners of not less than 50 per centum of the land situated in the drainage area above each retention reservoir to be installed with Federal assistance; and

(6) submit a plan of repayment satisfactory to the Secretary for any loan or advancement made under the provisions of section 8. (68 Stat. 667; § 1, Act of August 7, 1956, 70 Stat. 1088; § 1, Act of September 2, 1958, 72 Stat. 1605; Act of June 29, 1960, 74 Stat. 254; §§ 103 (1), (2), 104, Act of September 27, 1962, 76 Stat. 608; § 201 (d)-(f), Act of August 30, 1972, 86 Stat. 668; § 1512 (d), Act of December 22, 1981, 95 Stat. 1333; 16 U.S.C. § 1004)

EXPLANATORY NOTES

1981 Amendment. Section 1512(d) of the Act of December 22, 1981 (Public Law 97–98, 95 Stat. 1333) amended section 4 by adding the proviso authorizing the Secretary to bear an amount not to exceed one-half of the costs of the land, easements, or rights-of-way acquired or to be acquired by the local organization for mitigation of fish and wildlife habitat losses and directing that such acquisitions are not limited to the confines of the watershed project boundaries. The 1981 Act does not appear herein.

1972 Amendment. Section 201, subsections (d) through (f), of the Act of August 30, 1972 (Public Law 92–419, 86 Stat. 668) amended section 4 by: inserting in paragraph (1) after "without cost to the Federal government" the words "from funds appropriated for the purposes of this Act"; substituting in paragraph (2) (A) "fish and wildlife development, recreational development, ground water recharge, water quality management, or the conservation and proper utilization of land", for "fish and wildlife or recreational devel-

opment" and adding the water quality management proviso; and, by revising the text and changing the phraseology of paragraph (2)(B), authorizing payment for water storage for present demands, inserting at the end of the first proviso "as hereinafter provided", substituting provisions regarding the Secretary's determination of adequate assurances by the local agency or by an agency of the State having authority to give such assurances that the Secretary will be reimbursed the cost of water supply storage for anticipated future demands, and that the local organization will pay not less than 50 per centum of the cost of storage for present water supply demands, for provisions respecting the giving of reasonable assurances by the local organization of repayment of cost of such water supply storage for anticipated future demands, and substituting permissive provisions for repayment of cost for anticipated future demands within life of the reservoir structure for former mandatory provisions. The 1972 Act does not appear herein.

Pages 1168-1169

Sec. 5. [Works of improvement plan—Reimbursement for engineering services—Limits on Federal construction—Plan submission—Presidential regulations.]—(1) At such time as the Secretary and the interested local organization have agreed on a plan for works of improvement, and the Secretary has determined that the benefits exceed the costs, and the local organization has met the requirements for participation in carrying out the works of improvement as set forth in section 4, the local organization may secure engineering and other services, including the design, preparation of contracts and specifications, awarding of contracts, and supervision of construction, in connection with such works of improvement, by retaining or employing a professional engineer or engineers satisfactory to the Secretary or may request the Secretary to provide such services: *Provided*, That if the local organization elects to employ a professional engineer or engineers, the Secretary shall reimburse the local organization for the costs of such engineering and other services secured by the local organization as are properly chargeable to such works of improvement in an amount not to exceed the amount agreed upon in the plan for works of improvement or any modification thereof: *Provided further*, That the Secretary may advance such amounts as may be necessary to pay for such services, but such advances with respect to any works of improvement shall not exceed 5 per centum of the estimated installation cost of such works.

(2) [Federal construction—Request by local organization.]—Except as to the installation of works of improvement on Federal lands, the Secretary shall not construct or enter into any contract for the construction of any structure: *Provided*, That, if requested to do so by the local organization, the Secretary may enter into contracts for the construction of structures.

(3) [Transmission of certain plans to Congress.]—Whenever the estimated Federal contribution to the construction costs of works of improvements in the plan for any watershed or subwatershed area shall exceed $5,000,000 or the works of improvement include any structure having a total capacity in excess of twenty-five hundred acre-feet, the Secretary shall transmit a copy of the plan and the justification therefor to the Congress through the President.

(4) [Transmission of certain plans and recommendations to Con-

gress.]—Any plans for works of improvement involving an estimated Federal contribution to construction costs in excess of $5,000,000 or including any structure having a total capacity in excess of twenty-five hundred acre-feet (a) which includes works of improvement for reclamation or irrigation, or which affects public or other lands or wildlife under the jurisdiction of the Secretary of the Interior, (b) which includes Federal assistance for goodwater detention structures, (c) which includes features which may affect the public health, or (d) which includes measures for control or abatement of water pollution, shall be submitted to the Secretary of the Interior, the Secretary of the Army, the Secretary of Health and Human Services, or the Administrator of the Environmental Protection Agency, respectively, for his views and recommendations at least thirty days prior to transmission of the plan to the Congress through the President. The views and recommendations of the Secretary of the Interior, the Secretary of the Army, the Secretary of Health and Human Services, and the Administrator of the Environmental Protection Agency, if received by the Secretary prior to the expiration of the above thirty-day period, shall accompany the plan transmitted by the Secretary to the Congress through the President.

(5) **[Rules and regulations.]**—Prior to any Federal participation in the works of improvement under this Act, the President shall issue such rules and regulations as he deems necessary or desirable to carry out the purposes of this Act, and to assure the coordination of the work authorized under this Act and related work of other agencies, including the Department of the Interior and the Department of the Army. (68 Stat. 667; Act of July 19, 1956, 70 Stat. 580; § 1(f), Act of August 7, 1956, 70 Stat. 1089; § 105, Act of September 27, 1962, 76 Stat. 609; Act of June 27, 1968, 82 Stat. 250; § 201(g), Act of August 30, 1972, 86 Stat. 669; § 1506(b), (c), Act of September 29, 1977, 91 Stat. 1022; § 509(b), Act of October 17, 1979, 93 Stat. 695; § 1512(e), (f), Act of December 22, 1981, 95 Stat. 1333; 16 U.S.C. § 1005)

EXPLANATORY NOTES

1981 Amendment. Section 1512 of the Act of December 22, 1981 (Public Law 97–98, 95 Stat. 1333) amended section 5 by substituting "$5,000,000" for "$1,000,000" in clauses (3) and (4). The 1981 Act does not appear herein.

1977 Amendment. Section 1506 of the Act of September 29, 1977 (Public Law 95–113, 91 Stat. 1022) amended section 5 by substituting "$1,000,000" for "$250,000" in clauses (3) and (4). The 1977 Act does not appear herein.

1972 Amendment. Section 201(g) of the Act of August 30, 1972 (Public Law 92–419, 86 Stat. 669) amended section 5 by: substituting "works of improvement for reclamation or irrigation" for "reclamation or irrigation works"; substituting "goodwater" for "floodwater"; adding the provisions regarding features which may affect public health and measures for control or abatement of water pollution; and by requiring submission of plans to the Secretary of Health, Education, and Welfare, or the Administrator of the Environmental Protection Agency, and transmittal of the views and recommendations of such officials to the Congress. The 1972 Act does not appear herein.

1968 Amendment. The Act of June 27, 1968 (Public Law 90–361, 82 Stat. 250) amended subsection (2) by adding the proviso as it appears in the text. The 1968 Act does not appear herein. For legislative history of the 1968 Act, see H.R. Rept. No. 1539 and S. Rept. No. 1125 on S. 2276.

Pages 1170-1171

Sec. 8. [Loans for financing local share of costs and repayment—Maximum amount.]—The Secretary is authorized to make loans or advancements (a) to local organizations to finance the local share of costs of carrying out works of improvement provided for in this Act, and (b) to State and local agencies to finance the local share of costs of carrying out works of improvement (as defined in section 2 of this Act) in connection with the eleven watershed improvement programs authorized by section 13 of the Act of December 22, 1944 (58 Stat. 887), as amended and supplemented: *Provided*, That the works of improvement in connection with said eleven watershed improvement programs shall be integral parts of watershed or subwatershed work plans agreed upon by the Secretary of Agriculture and the concerned State and local agencies. Such loans or advancements shall be made under contracts or agreements which will provide, under such terms and conditions as the Secretary deems appropriate, for the repayment thereof in not more than fifty years from the date when the principal benefits of the works of improvement first become available, with interest at the average rate, as determined by the Secretary of the Treasury, payable by the Treasury upon its marketable public obligations outstanding at the beginning of the fiscal year in which the loan or advancement is made, which are neither due nor callable for redemption for fifteen years from date of issue. With respect to any single plan for works of improvement. the amount of any such loan or advancement shall not exceed $10,000,000. (Added by § 1(g), Act of August 7, 1956, 70 Stat. 1090; § 2, Act of May 13, 1960, 74 Stat. 131; § 1508, Act of September 29, 1977, 91 Stat. 1022; 16 U.S.C. § 1006a)

EXPLANATORY NOTE

1977 Amendment. Section 1508 of the Act of September 29, 1977 (Public Law 95–113, 91 Stat. 1022) amended section 8 by substituting "$10,000,000" for "five million dollars" in the last sentence. The 1977 Act does not appear herein.

SABINE RIVER COMPACT

Pages 1174-1175

[Sec. 1. Sabine River Compact—Consent of Congress.]—The consent of the Congress is hereby given to the interstate compact relating to the waters of the Sabine River and its tributaries authorized by the Act of November 1, 1951 (Public Law Numbered 252, Eighty-second Congress, first session), which was signed by the representatives for the States of Louisiana and Texas and approved by the representative of the United States, at Logansport, Louisiana, on January 26, 1953, and thereafter ratified, and approved by the Legislatures of the States of Louisiana and Texas, which compact reads as follows:

SABINE RIVER COMPACT

The State of Texas and the State of Louisiana, parties signatory to this Compact (hereinafter referred to as "Texas" and "Louisiana", respectively, or individually as a "State", or collectively as the "States"), having resolved to conclude a compact with respect to the waters of the Sabine River, and having appointed representatives as follows:

For Texas: HENRY L. WOODWORTH, Interstate Compact Commissioner for Texas; and JOHN W. SIMMONS, President of the Sabine River Authority of Texas;

For Louisiana: ROY T. SESSUMS, Director of the Department of Public Works of the State of Louisiana;

and consent to negotiate and enter into the said Compact having been granted by Act of Congress of the United States approved November 1, 1951 (Public Law No. 252; 82nd Congress, First Session), and pursuant thereto the President having designated Louis W. Prentiss as the representative of the United States, the said representatives for Texas and Louisiana, after negotiations participated in by the representative of the United States, have for such Compact agreed upon Articles as hereinafter set forth. The major purposes of this Compact are to provide for an equitable apportionment between the States of Louisiana and Texas of the waters of the Sabine River and its tributaries, thereby removing the causes of present and future controversy between the States over the conservation and utilization of said waters; to encourage the development, conservation and utilization of the water resources of the Sabine River and its tributaries; and to establish a basis for cooperative planning and action by the States for the construction, operation and maintenance of projects for water conservation and utilization purposes on that reach of the Sabine River touching both States, and for apportionment of the benefits therefrom.

ARTICLE I

As used in this Compact:

* * * * *

EXPLANATORY NOTE

1977 Amendment. Section 1 of the Act of July 23, 1977 (Public Law 95–71, 91 Stat. 281) amended the preamble by deleting its last paragraph, which stated: "It is recognized that pollution abatement and salt water intrusion are problems which are of concern to the States of Louisiana and Texas, but inasmuch as this Compact is limited to the equitable apportionment of the waters of the Sabine River and its tributaries between the States of Louisiana and Texas, this Compact does not undertake the solution of these problems." Section 2 of the Act reserved the right to amend or repeal section 1 of the Act. The 1977 Act does not appear herein. For legislative history of the 1977 Act, see H.R. Rept. No. 277 on H.R. 1551 and S. Rept. No. 3190.

AINSWORTH, LAVACA FLATS, MIRAGE FLATS EXTENSION, AND O'NEILL UNITS, MISSOURI RIVER BASIN PROJECT

Page 1186

[Sec. 1. Missouri River Basin project—Reauthorization.]—

* * * * *

Notes of Opinions

Ainsworth unit, just compensation 1
O'Neill unit, NEPA compliance 2

1. Ainsworth unit, just compensation

No Fifth Amendment right to just compensation arises when an easement is exercised pursuant to the Canal Act of 1890 (23 Stat. 371, 391, 43 U.S.C. § 945). The sole right to compensation in this instance arises from the statutory authorization of section 1 of the Act of October 4, 1966 (80 Stat. 873, 43 U.S.C. § 945a). As the latter Act does not include a provision for interest, no interest may be assessed on that portion of the verdict and judgment awarded for the taking, by the Bureau of Reclamation, of land subject to the Canal Act in connection with the construction of the Ainsworth Canal. *United States v. 106.64 Acres of Land*, 264 F. Supp. 199 (D. Neb. 1967).

2. O'Neill unit, NEPA compliance

In preparing an environmental impact statement as required by section 102 of the National Environmental Policy Act the discussion of environmental effects need not be exhaustive, but need only provide sufficient information for a reasoned choice of alternatives. The Act does not require that "each problem be documented from every angle to explore its every potential for good or ill." Rather, in determining whether an agency has complied with section 102, the rule of reason should govern. Nevertheless, both the "Final Environmental Statement" and the subsequent Final Environmental Statement Supplement for the O'Neill Unit, Lower Niobrara Division of the Pick-Sloan Missouri Basin Project, were held to comply inadequately with the requirements of the Act with regard to several aspects of the Unit's effect on the environment. *Save the Niobrara River Association v. Andrus*, 483 F. Supp. 844 (D. Neb. 1979).

Because it is the essence of the National Environmental Policy Act that the requisite detailed statement gather in one place a discussion of the relative environmental impacts of alternatives, in reviewing the adequacy of the environmental impact statement for the O'Neill Unit, Lower Niobrara Division of the Pick-Sloan Missouri Basin Program, only the document actually entitled "Final Environmental Statement" will be examined. No consideration should be given to the Unit's Feasibility Report of December 7, 1965, its nine appendices, or the Reevaluation Statement of April, 1971, none of which are attached to or cited in the Final Environmental Statement. Where, however, a conclusion is stated in a Final Environmental Statement and the reader is then directed to another document for data supporting the conclusion, the document, to that extent, should be considered a part of the Statement, if it is accessible to the public. *Save the Niobrara River Association v. Andrus*, 483 F. Supp. 844 (D. Neb. 1979).

In preparing the "Final Environmental Statement" for the O'Neill Unit, Lower Niobrara Division of the Pick-Sloan Missouri Basin Project, the Bureau was not obligated to provide information regarding the economic benefits and costs of the proposed project. Neither the National Environmental Policy Act nor decisional law require this information unless, of course, it has environmental implications. If, however, the environmental impact statement does delineate economic issues, they should be fully and objectively described. *Save the Niobrara River Association v. Andrus*, 483 F. Supp. 844 (D. Neb. 1979).

WATERFOWL MANAGEMENT, CENTRAL VALLEY PROJECT

Page 1192

Sec. 6. [Contracts for water with public organizations for waterfowl purposes—Nonreimbursable basis—Obligations of contracting public organizations—Rights revert to Secretary in case of default—Covenants restricting use of lands.]—The Secretary of the Interior is authorized to contract for the delivery of water to public organizations or agencies for use within the boundaries of such organizations or agencies for waterfowl purposes in the Grasslands area of the San Joaquin Valley. If and when available, such water shall be delivered from the Central Valley project to the contracting entity, and the cost of furnishing the water shall not be reimbursable or returnable under the Federal reclamation laws: *Provided*, That, in order for the delivery of such water to continue on a nonreimbursable or nonreturnable basis—

(a) the public organizations or agencies contracting with the Secretary of the Interior, excluding the State of California, shall deliver annually to the United States Fish and Wildlife Service (hereinafter referred to as the 'Service'), at no cost to the United States, not less than three thousand five hundred acre-feet of water during the period October 1 through November 30, inclusive, and not less than four thousand acre-feet of water during the period May 1 through September 30, inclusive, if available: *Provided*, That such amounts of water and times of delivery may be changed upon approval of the Secretary of the Interior;

(b) the public organizations or agencies, excluding the State of California, shall construct, operate, and maintain any water conveyance facilities necessary to deliver the water referred to in section 6(a) of this Act to a point or points within the boundaries of such public organization or agency as designated by the Service, or to such points as may be mutually agreed upon by the public organization or agency and the Service. The Service shall be responsible for delivering the water from such point or points to appropriate locations within lands under its jurisdiction;

(c) any contract entered into by the Secretary of the Interior and any public organization or agency pursuant to this Act shall provide that in the event the public organization or agency for any reason fails to carry out the obligations imposed upon it by said contract or by this Act, the rights of use of any facilities referred to in subsection (b), and the rights to all water contracted for by the organization or agency pursuant to this Act shall revert to the Secretary of the Interior for migratory waterfowl purposes in accordance with the laws of the State of California; and

(d) in accordance with existing or future contracts, the use of lands located within the boundaries of the public organizations or agencies shall be restricted by covenants requiring that such lands be used only for the purpose of waterfowl and wildlife habitat conservation or other uses as may be mutually agreed upon by the public organizations or agencies and the Service. (68 Stat. 880; Act of November 8, 1978, 92 Stat. 3115; 16 U.S.C. § 695i)

* * * * *

Sec. 8. [Secretary authorized to negotiate contract amendments.]—The Secretary is hereby authorized to negotiate amendments to existing contracts to conform said contracts to the provisions of this Act. (Added by Act of November 8, 1978, 92 Stat. 3116; 16 U.S.C. § 695j-l)

EXPLANATORY NOTES

1978 Amendments. Section 10 of the Act of November 8, 1978 (Public Law 95–616, 92 Stat. 3115) amended the Act of August 27, 1954 by deleting the last sentence of section 6 and inserting in lieu thereof the language that appears above and by adding a new section 8. Extracts from the 1978 Act, including section 10, appear in Volume IV in chronological order.

Cross Reference, Suisun Marsh. The Act of December 3, 1980 (Public Law 96–495, 94 Stat. 2581) authorizes the Secretary of the Interior to enter into a cooperative agreement with the State of California to provide for mitigation of the adverse effects of the Central Valley project on the fish and wildlife resources of the Suisun Marsh, and provides for payment of the Federal share of the costs of the cooperative agreement. The 1980 Act appears in Volume IV in chronological order.

PALO VERDE DIVERSION DAM

Page 1210

Sec. 2. [Contract with Palo Verde Irrigation District—Right of District to install powerplant at diversion dam under license from the Federal Energy Regulatory Commission.]—

* * * * *

(c) to accept title to said dam, appurtenant works, lands, and interests in land upon payment by the district (which payment shall be made over a period of not more than fifty years) of the sum of $1,175,000, and upon repayment of any loan made pursuant to section 4, clause (c), of this Act;

(d) notwithstanding any provision of the Federal Power Act (16 U.S.C. 792 et seq.), to the contrary, the Palo Verde Irrigation District, California, shall have the exclusive right to utilize said dam, appurtenant works, lands, and interests in land for the development, generation, transmission, and disposal of electric power and energy pursuant to a license from the Federal Energy Regulatory Commission under part I of the Federal Power Act: *Provided*, That if the Palo Verde Irrigation District, California, after the date of enactment of this subsection shall notify the Secretary of the Interior that it relinquishes the right granted in this subsection there shall be and is hereby reserved to the United States or there shall be made available to it, as the case may require, the exclusive right to utilize, without cost to it, said dam, appurtenant works, lands, and interests in land for such development, generation, and transmission of electric power and energy as may hereafter be authorized by law: *Provided further*, That in the event it becomes practicable for the United States to develop hydroelectric energy at this site, the division of such energy between the United States and the district shall be a matter of negotiation prior to construction of any powerplant. (68 Stat. 1045; Act of August 14, 1981, 95 Stat. 945).

EXPLANATORY NOTE

1981 Amendment. The Act of August 14, 1981 (Public Law 97-41, 95 Stat. 945) amended subsection (c) and added a new subsection (d) to grant the Palo Verde Irrigation District the exclusive right to install a powerplant at the diversion dam pursuant to a license from the Federal Energy Regulatory Commission under part I of the Federal Power Act. The 1981 Act appears in Volume IV in chronological order.

LEASE OF PUBLIC LAND FOR PUBLIC WORKS

Page 1214

[Sec. 1. Public lands—Permits, leases, etc.]—

*   *   *   *   *

EXPLANATORY NOTE

Limited Repeal. Section 706(a) of the Federal Land Policy and Management Act of 1976 (Act of October 21, 1976, Public Law 94–579, 90 Stat. 2793) repealed section 1 of this Act insofar as it applies to the issuance of rights-of-way over, upon, under, and through the public lands and lands in the National Forest System. Extracts from the 1976 Act, including section 706(a), appear in Volume IV in chronological order.

DISTRIBUTION SYSTEM LOANS ACT

Pages 1218-1220

[Sec. 1. Irrigation distribution and drainage systems.]—Distribution and drainage systems authorized to be constructed under the Federal reclamation laws may, in lieu of construction by the Secretary of the Interior (referred to in this Act as the 'Secretary'), be constructed by irrigation districts or other public agencies according to plans and specifications approved by the Secretary as provided in this Act. The drainage systems referred to in this Act are those required for collection and removal of excess irrigation water, either on or below the surface of the ground and do not include enlargement or alteration of existing waterways for disposition of natural runoff. (69 Stat. 244; Act of October 13, 1972, 86 Stat. 804; 43 U.S.C. § 421a)

Sec. 2. [Loans for construction.]—To assist financially in the construction of the aforesaid local distribution and drainage systems by irrigation districts and other public agencies the Secretary is authorized, on application therefor by such irrigation districts or other public agencies, to make funds available on a loan basis from moneys appropriated for the construction of such distribution and drainage systems to any irrigation district or other public agency in an amount equal to the estimated construction cost of such system, contingent upon a finding by the Secretary that the loan can be returned to the United States in accordance with the general repayment provisions of sections 2(d) and 9(d) of the Reclamation Project Act of August 4, 1939, and upon a showing that such district or agency already holds or can acquire all lands and interests in land (except public and other lands or interests in land owned by the United States which are within the administrative jurisdiction of the Secretary and subject to disposition by him) necessary for the construction, operation, and maintenance of the project. The Secretary shall, upon approval of a loan, including any loan for a distribution and drainage system receiving water from the San Luis unit, Central Valley project, authorized by the Act of June 3, 1960 (74 Stat. 156), enter into a repayment contract which includes such provisions as the Secretary shall deem necessary and proper to provide assurance of prompt repayment of the loan within not to exceed forty years plus a development period not to exceed ten years. The term "irrigation district or other public agency" shall for the purposes of this Act mean any conservancy district, irrigation district, water users' organization, or other organization, which is organized under State law and which has capacity to enter into contracts with the United States pursuant to the Federal reclamation laws. (69 Stat. 245; Act of October 13, 1972, 86 Stat. 804; 43 U.S.C. § 421b)

Sec. 3. [Conditions to loans—Use of lands.]—The Secretary shall require, as conditions to any such loan, that the borrower contribute in money or materials, labor, lands or interests in land, computed at their reasonable value, a portion not in excess of 10 per centum, of the construction cost of the distribution and drainage system (including all costs of acquiring lands and interests in land), that the plans for the system be in accord with sound engineering practices and be such as will achieve the purposes for which the system was authorized, and that the borrower agree to account in full in regard to all disbursements of borrowed funds and to return at once for application toward amortization of the loan all funds which are not expended in the construction of the distribution and drainage system. Every organization contracting for repayment of a loan under this Act shall operate and maintain its distribution and drainage works in conformity with reasonable contractual requirements determined to be appropriate for the protection of the United States. The Secretary is hereby authorized to reconvey to borrowers all lands or interests in lands and distribution works transferred to the United States under the provisions of this Act: *Provided*, That any reconveyance shall be upon the condition that the repayment contract of the borrower be amended to include such provisions as the Secretary shall deem necessary or proper to provide assurance of and security for prompt repayment of the loan. The head of any department or agency of the Government within whose administrative jurisdiction are lands owned by the United States the use of which is reasonably necessary for the construction, operation, and maintenance of distribution and drainage works under this Act may grant to a borrower or prospective borrower under this Act revocable permission for the use thereof in like manner as under the Acts of March 3, 1891, sections 18 to 21 (26 Stat. 1101), as amended (43 U.S.C. 946-949), January 21, 1895 (28 Stat. 635), as amended (43 U.S.C. 956), February 15, 1901 (31 Stat. 790), as amended (16 U.S.C. 79, 522; 43 U.S.C. 959), February 1, 1905 (33 Stat. 628; 16 U.S.C. 524), March 1, 1921 (41 Stat. 1194; 43 U.S.C. 950), May 9, 1941 (55 Stat. 183; 43 U.S.C. 931a), July 24, 1946, section 7 (60 Stat. 643), as amended (43 U.S.C. 931b), May 31, 1947 (61 Stat. 124; 38 U.S.C. 11i), February 5, 1948 (62 Stat. 17; 25 U.S.C. 323-328), or September 3, 1954 (68 Stat. 1146; 43 U.S.C. 931c-931d), or any other similar Act which is applicable to the lands involved: *Provided*, That no such permission shall be granted in the case of lands being administered for national park, national monument, or wildlife purposes. (69 Stat. 245; Act of May 14, 1956, 70 Stat. 155; Act of October 13, 1972, 86 Stat. 804; 43 U.S.C. § 421c)

Sec. 4. [Reclamation laws.]—Except as herein otherwise provided, the provisions of the Federal reclamation laws, and Acts amendatory thereto, are continued in full force and effect. (69 Stat. 245; 43 U.S.C. § 421d)

Sec. 5. [Delivery and distribution of municipal and industrial water supplies an authorized project purpose—Interest rate.]—Unless otherwise provided in the Act authorizing construction of the project, the delivery and distribution of municipal and industrial water supplies shall be deemed to be an authorized project purpose under this Act, and where appropriate, an allocation of loan funds acceptable to the Secretary shall be made between irrigation and municipal and industrial purposes. Loan repayment contracts shall require that the borrower pay interest on that portion of the unamortized loan obligation (including interest during construction) allocated in each year to municipal and industrial purposes at the rate provided in the Act authorizing the project, or absent such an authorized rate, at a rate determined by the Secretary of the Treasury as of the beginning of the fiscal year in which the contract, or contract amendment entered into pursuant to section 6 hereof, is executed, on the basis of the computed average interest rate payable by the Treasury upon its outstanding marketable public obligations which are neither due nor callable for redemption for fifteen years from date of issue, and by adjusting such average rate to the nearest one-eighth of 1 per centum. (86 Stat. 805; 43 U.S.C. § 421e)

Sec. 6. [Amendment of existing contracts.]—The Secretary is hereby authorized to negotiate amendments to existing water service and irrigation distribution system loan contracts to conform said contracts to the provisions of this Act. (86 Stat. 805; 43 U.S.C. § 421f)

Sec. 7. [Existing water rights unaffected.]—Nothing in this Act shall be construed to repeal or limit the procedural and substantive requirements of section 8 of the Act of June 17, 1902 (32 Stat. 388). (86 Stat. 806; 43 U.S.C. § 421g)

Sec. 8. [Works to comply with existing law.]—Works financed by loans made under this Act shall be subject to all procedural and substantive requirements of the Fish and Wildlife Coordination Act (48 Stat. 401, as amended); the Federal Water Pollution Control Act, as amended (33 U.S.C. 1151); and the National Environmental Policy Act of 1969 (83 Stat. 852; 42 U.S.C. 4321). (86 Stat. 806; 43 U.S.C. § 421h)

EXPLANATORY NOTES

1972 Amendment. The Act of October 13, 1972 (Public Law 92–487, 86 Stat. 804) amended the Act to read as it appears in the text by adding sections 5, 6, 7, and 8 and rewriting sections 1, 2, and 3. Section 4 remained unchanged. The report of the House Committee on Interior and Insular Affairs notes that "the new language eliminates the requirement that the United States must hold title to the rights-of-way required for the construction and operation of the system, and it clarifies present law by providing that drainage and municipal and industrial water supply are authorized purposes of the program." H.R. Rept. No. 1213, 92d Cong., 2d Sess. 3 (1972). The 1972 Act appears in Volume IV in chronological order.

Supplementary Provision: Applicability of Emergency Fund Act. The Act of October 1, 1982 (Public Law 97–275, 96 Stat. 1185) amended the Emergency Fund Act of 1948 to make that Act applicable to all projects and project facilities governed by Reclamation law, including projects and facilities serving municipal and industrial purposes and projects and facilities constructed with funds provided under the Small Reclamation Projects Act and the Distribution System Loans Act. The 1982 Act appears in Volume IV in chronological order.

NOTES OF OPINIONS

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1. Applicability

The Distribution System Loans Act, as amended, does not authorize the construction of municipal sewer systems, the municipal and industrial water use equivalent of an agricultural drainage system, as both the Act and legislative history plainly specify that it applies to drainage systems required "for collection and removal of excess irrigation water." Memorandum of Assistant Solicitor Mauro to Commissioner, Water and Power Resources Service, February 9, 1981.

2. Appropriation ceilings

Loan applications that individually exceed the total amount authorized to be appropriated for construction of non-Indian distribution systems by section 309(b) of the Colorado River Basin Project Act, 43 U.S.C. § 1528(b), may not be approved if such approval would constitute an obligation to expend funds. Even if approval would constitute only a preliminary action allowing the proposal to move forward through the contracting process, Congress should be asked for additional authority before any action leading to commitment or obligation of funds is taken. Memorandum of Acting Associate Solicitor Fisher to Commissioner of Reclamation, March 12, 1982.

3. Central Arizona Project

Inasmuch as section 301(a) of the Colorado River Basin Project Act authorizes the Secretary to construct "related water distribution and drainage works" and the legislative history of that Act demonstrates that Congress intended to give the Secretary flexibility in choosing the program under which non-Indian distribution and drainage systems for the Central Arizona Project would be financed and constructed, those systems may be financed and constructed pursuant to repayment contracts under section 9(d) of the Reclamation Project Act of 1939 as well as loan contracts under the Distribution System Loans Act. Memorandum of Acting Associate Solicitor Fisher to Commissioner of Reclamation, March 12, 1982.

4. Contribution by loan applicant

Funds loaned under the Act may be used to acquire existing facilities to consolidate with loan-constructed facilities to supply an integrated project distribution system, and the applicant-borrower can utilize its own funds to acquire facilities such as wells or local distribution works and have the cost of that acquisition considered as a contribution, provided the same general statutory requirements applicable to use of loan funds for construction of new facilities are met. That is, the Secretary must determine that (1) the use to which the facilities will be put is an authorized project purpose, (2) the plan submitted by the applicant is in accord with sound engineering practices and will achieve the authorized project purpose, (3) the purchase of such facilities is the most economical means of achieving the authorized project purpose, and (4) the cost of acquiring such facilities would be significantly less than the cost of acquiring new facilities. Memorandum of Assistant Solicitor Mauro to Commissioner, December 30, 1980.

5. Power rates

The refusal of the Bureau of Reclamation to supply power to the Arvin-Edison Water Storage District at the Bureau's "project rate" of 2.5 mills, a rate used primarily for internal accounting purposes, does not constitute a denial of benefits or privileges under the Federal Reclamation laws, in violation of the Distribution System Loans Act prior to the 1972 amendment, because the Bureau also denies the 2.5 mill rate to other Friant-Kern water user organizations in whose behalf the Government constructed section 9(d) distribution systems with pumping features provided. Memorandum of Assistant Solicitor Pelz, April 24, 1975.

6. Repayment contracts, labor standards

The Bureau of Reclamation is not required to include the labor standards established by either the Copeland Act or the Contract Work Hours Standards Act in Reclamation repayment contracts executed pursuant to the Small Reclamation Projects Act and the Distribution System Loans Act, as the latter Acts make no provision for the application of wage and hour standards to the work financed by the grant or loan issued thereunder. Moreover, Copeland Act contract provisions requiring adherence to Department of Labor regulations are intended to aid in enforcement of the Davis-Bacon Act and other statutes dealing with Federally-assisted construction that contain similar wage provisions and in the enforcement of overtime provisions of the Contract Work Hours Standards Act whenever they are applicable to construction work. In the absence of Davis-Bacon Act provisions or Contract Work Hour Standards provisions there is no requirement for inclusion of a contract provision relating to Copeland Act regulations. Memorandum from Acting Associate Solicitor Davis to Commissioner of Reclamation, July 18, 1968.

7. Title to facilities

The administrative practice of the Bureau of Reclamation is that the 2.5 mill rate, which is used by the Bureau as a matter primarily of internal accounting to transfer power operation, maintenance and replacement expense from the power purpose of the project to the water purpose for cost suballocation and repayment purposes, applies only to power used to operate pumps that were built as Federal facilities as part of the project, which facilities remain property of the United States in accordance with Reclamation law. The fact that the original contract with the Arvin-Edison Water Storage District provided, as then required by the Distribution System Loans Act, that the Government hold title to its facilities until the loan was repaid, does not bring Arvin-Edison's pumps within this practice because the only purpose for granting title to the United States was to provide security for the repayment of its loan. In any event, this requirement was eliminated in 1972. Memorandum of Assistant Solicitor Pelz, April 24, 1975.

8. Uniform Relocation Assistance and Land Acquisition Policies Act

The Uniform Relocation Assistance and Land Acquisition Policies Act of 1970 (Uniform Act) applies to acquisitions made by irrigation districts or other public agencies for construction of facilities financed under the Distribution System Loans Act. It is evident that a loan under the Distribution System Loans Act qualifies as Federal financial assistance within the meaning of the Uniform Act. Moreover, it is apparent from the overall scheme of the Distribution System Loans Act that loan recipients must be either irrigation districts, which have inherent taxing authority, or other public agencies which also enjoy the power to tax and, therefore, such loan recipients must be considered political subdivisions, bringing them within the definition of the term "State agency" in section 101(3) of the Uniform Act. Memorandum of Associate Solicitor Morthland to Commissioner of Reclamation, June 28, 1971.

9. Use of reclamation fund

The language and legislative history of the Act show that the reclamation fund is available for loans made thereunder. The statute indicates that loans are to be made from funds which have been specifically appropriated for the construction of irrigation distribution systems authorized to be constructed under Reclamation laws (43 U.S.C. §§ 421a and b). To the extent these funds are appropriated from the reclamation fund, it is self-evident that they are available for the construction of irrigation distribution systems authorized to be constructed under Reclamation law, and for loans to irrigation districts and public agencies under the Act. Memorandum of Associate Solicitor Good to Commissioner, September 8, 1982.

SEWERAGE SYSTEM, TOWN OF GLENDO

Page 1227

EXPLANATORY NOTE

Error in the Text of Volume II. The date that appears in the sixth line of the second Explanatory Note should be "July 16, 1954," rather than "July 16, 1964".

ALASKAN INVESTIGATIONS

Page 1229

EXPLANATORY NOTE

Codification. This Act has been recodified as 42 U.S.C. §§ 1962d-12, 13 and 14.

NOTE OF OPINION

1. Limitation on appropriations

The provision in the Act of August 9, 1955 (69 Stat. 618) limiting appropriations for water resources investigations in Alaska to $250,000 per year, does not apply to general investigations and planning and resource studies of the Alaska Power Administration which are justified under other laws, such as the Eklutna Project authorization of July 31, 1950 (64 Stat. 382), as amended; the Snettisham project authorization in section 204 of the Flood Control Act of 1962 (76 Stat. 1193); section 5 of the Flood Control Act of 1944 (58 Stat. 890); and the Public Land Administration Act of 1961 (43 U.S.C. § 1362). Acting Solicitor Weinberg Opinion, M-36727, March 27, 1968.

CONSENT TO NEGOTIATE ARKANSAS RIVER COMPACT

Page 1230

EXPLANATORY NOTE

Error in the Text of Volume II. The subheading under the title of this Act should be "[STATES OF KANSAS AND OKLAHOMA]" rather than ["STATES OF ARKANSAS AND OKLAHOMA]".

CONSENT TO NEGOTIATE RED RIVER COMPACT

Page 1231

[Red River—Consent of Congress to negotiation of compact.]—

* * * * *

EXPLANATORY NOTE

Cross Reference, Red River Compact. The Act of December 22, 1980 (Public Law 96-564, 94 Stat. 3305) granted the consent of Congress to the Red River Compact negotiated among the States of Arkansas, Louisiana, Oklahoma, and Texas. The 1980 Act appears in Volume IV in chronological order.

TRINITY RIVER DIVISION, CENTRAL VALLEY PROJECT

Page 1236

Sec. 2. [Integration and coordination with other features of Central Valley project—Fish and wildlife preservation and propagation.]—

* * * * *

NOTES OF OPINION

1. Fish and wildlife preservation

Nothing in the language, structure or legislative history of the Act of August 12, 1955 indicates that the proviso of section 2, requiring the Secretary to "adopt appropriate measures" for fish conservation, obligates the Secretary to select the most appropriate schedule of water releases on the Trinity River for fish preservation in disregard of the effects of such releases on the Central Valley Project generally. In light of the principal purposes of the Act—"increasing the supply of water available for irrigation and other beneficial uses in the Central Valley of California" (section 1)—Congress could not have reasonably intended that the Secretary consider the question of appropriate measures for fish conservation in isolation from the management practices of the Central Valley Project as a whole. *County of Trinity v. Andrus*, 438 F. Supp. 1368 (E.D. Cal. 1977).

The proviso of section 2 of the Act of August 12, 1955 directing the Secretary of Interior to adopt appropriate measures to "insure the preservation" of fish does not impose an absolute duty to maintain fish populations at pre-Trinity project levels, but merely requires that some fish life be maintained. The selection of appropriate preservation measures is a matter of agency discretion and must necessarily include a determination of what levels of fish population are reasonably attainable under current environmental conditions. *County of Trinity v. Andrus*, 438 F. Supp. 1368 (E.D. Cal. 1977).

The Bureau of Reclamation, during drought conditions, is authorized to drawdown carryover storage at Clair Engle Lake to a level which would still permit water releases into the Trinity River sufficient to meet the Bureau's minimum monthly release schedule and to comply with the specific flow requirements of section 2 of the Act of August 12, 1955. Even though that section further requires the Secretary "to adopt appropriate measures to insure the preservation and propagation of fish," and increased releases, of an undetermined amount, could improve fish habitat, such drawdown was neither unreasonable, arbitrary nor capricious, as: 1) the record plainly establishes a history of voluntary cooperation by the Bureau with other agencies to identify the causes of the decline in fish propagation and to help remedy known problems; 2) there is no evidence that in reaching its decision the Bureau failed to consider all relevant factors, including recommendations and reports prepared by wildlife conservation officials setting forth extensive data on the problem; 3) none of the studies has been able to quantify the amount of water appropriate for the preservation and propagation of fish, but have shown that a number of other problems have contributed to the decline of fish populations; and 4) experimentation with water flows during a drought would be extremely costly to other Central Valley Project users. *County of Trinity v. Andrus*, 438 F. Supp. 1368 (E.D. Cal. 1977).

No private right of action arises under the Fish and Wildlife Coordination Act of 1946. Thus a challenge to the Bureau's decision to drawdown carryover storage at Clair Engle Lake and diminish releases into the Trinity River because of an area drought must be dismissed even though such action could adversely affect fish habitats in the river. *County of Trinity v. Andrus*, 438 F. Supp. 1368 (E.D. Cal. 1977).

REPAYMENT CONTRACT, YUMA MESA DISTRICT

Pages 1239-1240

Sec. 2. [Surveys, investigations, construction of buildings, irrigation works and facilities.]—The Secretary is authorized on such terms and conditions as he deems appropriate to make drainage surveys and investigations of the lands within the district, to construct drainage facilities and works therefor, to install additional pump capacity in the Yuma Mesa Pump Plant of not to exceed two hundred and seventy-five cubic feet per second, to construct such buildings and irrigation works and facilities determined by him to be appropriate in connection with the operation and maintenance of the lands situate within the district, and to provide in the contract referred to in section 1 hereof for the performance of such work. (70 Stat. 6; §1, Act of September 25, 1970, 84 Stat. 860)

EXPLANATORY NOTES

1970 Amendment. Section 1 of the Act of September 25, 1970 (Public Law 91-408, 84 Stat. 860) amended section 2 by adding the words "and irrigation works and facilities" after the word "buildings". The 1970 Act appears in Volume IV in chronological order.

Supplementary Provision: Water Quality Standards. Section 2 of the Act of September 25, 1970 (Public Law 91-408, 84 Stat. 860) provides, among other things, that the Yuma-Mesa division shall be operated in such manner that identifiable return flows of water will not cause the Colorado River stream system to be in violation of water quality standards promulgated pursuant to the Water Quality Act of 1965 (Public Law 89-234, 79 Stat. 903). That Act amended in part the Federal Water Pollution Control Act of 1956. The 1970 Act appears in Volume IV in chronological order; the 1965 Act does not appear herein; and the 1956 Act appears in Volume II at page 1278. The 1965 and 1956 Acts were substantially revised and amended by the Federal Water Pollution Control Act Amendments of 1972 (Act of October 18, 1972, Public Law 92-500, 86 Stat. 816), often referred to as the Clean Water Act, which are codified at 33 U.S.C. §§1251-1266, 1281-1297, 1311-1328, 1341-1345, and 1361-1376. Extracts from the 1972 Amendments appear in Volume IV in chronological order.

NOTE OF OPINION

1. Compensation for condemned lands

In acquiring by condemnation lands within the Yuma Mesa Irrigation and Drainage District, the United States must compensate the District for the loss of the assessment base for a pro rata share of the construction and operation and maintenance charges for the Gila Project. *United States v. 129.4 Acres of Land, More or Less,* 446 F. Supp. 1 (D. Ariz. 1976).

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Sec. 4. [Termination.]—The authority granted in section 1 of this Act to execute said contract shall terminate on December 31, 1957, but the contract executed on or prior to such date may be amended to include works authorized after such date by amendments to section 2. (70 Stat. 6; §2, Act of September 25, 1970, 84 Stat. 860)

Explanatory Note

1970 Amendment. Section 2 of the Act of September 25, 1970 (Public Law 91-408, 84 Stat. 860) amended section 4 to read as it appears in the text. The 1970 Act appears in Volume IV in chronological order.

WASHITA RIVER BASIN PROJECT

Page 1242

[Sec. 1. Washita River Basin project, Oklahoma.]—

* * * * *

Explanatory Note

Codification Omitted. The Act of February 25 1956 (70 Stat. 28), authorizing the Washita River Basin Project, originally was codified at 43 U.S.C. §§ 615-615e but was omitted from the 1976 and subsequent editions of the U.S. Code as having limited applicability.

Note of Opinion

1. NEPA compliance, herbicide application

A proposed major Federal action will significantly affect the quality of human life and thereby necessitate the filing of an environmental impact statement when reasonably expected environmental consequences would affect a decision by the Federal agency concerning the need for, or the proposed location or design of, the proposed Federal action. In order to apply this test there must be an analysis of the need for the Federal proposal, the environmental consequences which can reasonably be expected to be generated, and the availability of alternatives to achieve the objectives of the Federal proposal. Thus the Department of the Interior's proposal to apply the herbicide 2, 4—dichlorophenoxyacetic acid to the public water supply at the Fort Cobb Reservoir in order to obtain data on the residual levels and rate of dissipation of the herbicide in fish and hydro-soil and to control the growth of Eurasian watermilfoil, although a major Federal action, does not require the filing of an environmental impact statement as it will not significantly affect the human environment. The evidence demonstrates that (1) the presence of the watermilfoil represents a serious problem, (2) in the quantity planned for application the concentration of the herbicide in the reservoir will not exceed the established safe tolerance for human consumption as established by the Environmental Protection Agency, and (3) four alternatives to herbicide control were considered but rejected. *Citizens Against 2, 4-D v. Watt*, 527 F. Supp. 465 (W.D. Okla. 1981).

Pages 1242-1243

Sec. 2.(b) [Repayment contracts]—

* * * * *

Explanatory Note

Supplementary Provision: Relief From Contractual Obligations. The Act of May 18, 1968 (Public Law 90-311, 82 Stat. 125) authorized the Secretary to conduct feasibility studies in areas serving the Foss Reservoir Master Conservancy District to determine alternative water sources and methods of alleviating the quality and supply problems associated with water stored in Foss Reservoir and, to assist the District in developing an adequate interim water supply, further authorized the Secretary to relieve the District from existing repayment obligations and reschedule further payments in a satisfactory manner. The 1968 Act appears in Volume IV in chronological order.

WASHITA RIVER BASIN PROJECT

Note of Opinion

1. Municipal water supply

By authorizing the Secretary of Interior to enter into contracts to supply project water for "municipal water supply or miscellaneous purposes," section 9(c) of the Reclamation Project Act of 1939 permits the sale of water for industrial purposes from the Yellowtail and Boysen Reservoirs of the Missouri River Basin. It is clear that section 1(b) of the Flood Control Act of 1944 approved the disposition of project water for industrial purposes. It is also evident that the phrase "municipal water supply or miscellaneous purposes" was intended to encompass industrial purposes, as 1) the Act of June 21, 1963 expressly authorizes the renewal of contracts previously made under the 1939 Act for "municipal, domestic or industrial" purposes, 2) both section 2(b) of the Act of February 25, 1956 and section 301 of the Water Supply Act of 1958 illustrate that Congress has long associated municipal use with industrial use, and 3) Congress has been made aware of the Secretary's actions in selling project water for industrial use under the authority of the 1939 Act and has not objected. *Environmental Defense Fund, Inc. v. Morton*, 420 F. Supp. 1037 (D. Mont. 1976), aff'd sub nom. *Environmental Defense Fund, Inc. v. Andrus*, 596 F.2d 848 (9th Cir. 1979).

COLORADO RIVER STORAGE PROJECT

Pages 1248-1249

[Sec. 1. Colorado River storage project.]—

* * * * *

(1) **[Initial units—Wayne N. Aspinall Dam capacity—Report to Congress and President.]**—

* * * * *

(2) **[Participating projects—Protection of Rainbow Bridge National Monument.]**—To construct, operate, and maintain the following additional reclamation projects (including power-generating and transmission facilities related thereto), hereinafter referred to as participating projects: Central Utah (initial phase and the Uintah unit), San Juan-Chama (initial stage), Emery County, Florida, Hammond, La Barge, Lyman, Navajo Indian, Paonia (including the Minnesota unit, a dam and reservoir on Muddy Creek just above its confluence with the North Fork of the Gunnison River, and other necessary works), Animas-La Plata, Dolores, Dallas Creek, West Divide, San Miguel, Seedskadee, Savery-Pot Hook, Bostwick Park, Fruitland Mesa, Silt and Smith Fork: *Provided further,* That as part of the Glen Canyon Unit the Secretary of the Interior shall take adequate protective measures to preclude impairment of the Rainbow Bridge National Monument. (70 Stat. 105; Act of June 13, 1962, 76 Stat. 102; Act of September 2, 1964, 78 Stat. 852; §501, Act of September 30, 1968, 82 Stat. 896; Act of October 19, 1980, 94 Stat. 2239; 43 U.S.C. § 620)

EXPLANATORY NOTES

1980 Amendment. Section 108(c) of the Act of October 19, 1980 (Public Law 96-470, 94 Stat. 2239) amended section 1(2) by deleting the proviso following "Smith Fork". The deleted proviso read as follows: "*Provided,* That construction of the Uintah unit of the Central Utah project shall not be undertaken by the Secretary until he has completed a feasibility report on such unit and submitted such report to the Congress along with his certification that, in his judgment, the benefits of such unit or segment will exceed the costs and that such unit is physically and financially feasible, and the Congress has authorized the appropriation of funds for the construction thereof:". Extracts from the 1980 Act, including section 108(c), appear in Volume IV in chronological order.

Change of Name. Section 7 of the Act of October 3, 1980 (Public Law 96-375, 94 Stat. 1507) amended section 1(1) by substituting "Wayne N. Aspinall" for "Curecanti". The 1980 Act appears in Volume IV in chronological order.

1968 Amendment. Section 501(a) of the Colorado River Basin Project Act of September 30, 1968 (Public Law 90-537, 82 Stat. 896) amended section 1(2) by: inserting the words "and the Uintah unit" after the word "phase" within the parenthesis following "Central Utah"; deleting the words "Pine River Extension" and inserting in lieu thereof the words "Animas La-Plata, Dolores, Dallas Creek, West Divide, San Miguel"; and adding the proviso after the words "Smith Fork:" relating to the Uintah unit which was deleted by the 1980 Act. The 1968 Act appears in Volume IV in chronological order.

NOTES OF OPINIONS

Dallas Creek Project 7
Dolores Project 8
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1. Rainbow Bridge

Congress has repealed the last sentence of section 3 of the Colorado River Storage Project Act and the proviso of section 1(2) of that Act, both of which are designed to protect the Rainbow Bridge, by (1) disallowing from the Public Works Appropriation Act, 1961, an appropriation to initiate construction of facilities to protect Rainbow Bridge National Monument after specifically finding that the impoundment of water in Glen Canyon Reservoir would not result in any structural damage to the bridge, and (2) including in the 1961 Appropriations Act and all subsequent public works appropriations acts through 1973 a proviso prohibiting the use of funds appropriated for the Upper Colorado River Basin Fund for construction or operation of facilities to prevent waters of Lake Powell from entering any national monument. Nor can a court order that the Glen Canyon Dam be operated at a reduced level so that the lake would not exceed the level at which it reaches the outer boundary of the monument, as this would have the effect of placing the Glen Canyon facilities, as related to others in the overall system, at about one-half design capacity. To so radically change the effectiveness of the principal regulating reservoir would prevent the attainment of the objectives of the Colorado River Compacts, the Colorado River Storage Project Act, and the Colorado River Basin Project Act. *Friends of the Earth v. Armstrong*, 485 F.2d 1 (10th Cir. 1974), cert. denied, 414 U.S. 1171 (1974); accord, *Badoni v. Higginson*, 455 F. Supp. 641 (D. Utah 1977), aff'd, 638 F.2d 172 (10 Cir. 1980), cert. denied, 452 U.S. 954 (1981).

2. Indian lands

Although the impoundment of water in Lake Powell by Glen Canyon Dam, which caused the flooding of the Bridge Canyon and intrusion of lake waters onto Rainbow Bridge National Monument, resulted in the drowning of traditional Navajo Gods, an increased tourist presence, and denial of access to a prayer spot now under water, the Bureau of Reclamation's interest in maintaining the capacity of the lake at its intended level outweighs the religious interest of the Indians. In order to alleviate the complained-of infringements, the storage capacity of the lake would have to be cut in half and such reduction would limit and reduce the development of Colorado River water supplies in Colorado, New Mexico, Utah, and Wyoming on a permanent or a limited long-term basis for irrigation purposes, for development of mineral and other natural resources, and for municipal and industrial water supplies. *Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980), cert. denied, 452 U.S. 954 (1981).

4. NEPA compliance

Where one of the specific objectives of the Colorado River Storage Project Act, which authorized the Navajo Dam, is to mitigate losses of, and improve conditions for, the propagation of fish and wildlife, an environmental impact statement prepared in connection with the installation of a powerplant at the Dam was inadequate where it admitted that there would be some adverse impact on fish and wildlife, due to fluctuations in San Juan River flow rates, but failed to supply the detail necessary for informed decision-making. The Bureau cannot evade assessing the environmental consequences of a project under construction by simply deferring to the results of future studies, as once a facility has been completely constructed the economic cost of any alteration may be very great, and one of the purposes of the National Environmental Policy Act was to break the cycle of such incremental decision-making. *National Wildlife Federation v. Andrus*, 440 F. Supp. 1245 (D.D.C. 1977).

The consideration of possible alternatives is the linchpin of the entire environmental impact statement and should involve a "rigorous exploration and objective evaluation of the environmental impacts of all reasonable alternative actions, particularly those that might . . . avoid some or all the adverse environmental effects." The Bureau failed to comply with this criteria in preparing an environmental impact statement for the installation of a 23-megawatt powerplant at the Navajo Dam facility of the Colorado River Storage Project to power the sprinkler irrigation system of the Navajo Indian Irrigation

Project which discussed only briefly the options of obtaining power from existing power sources or using gas powered engines, and entirely neglected to even mention other reasonable alternatives such as 1) building a smaller powerplant, 2) obtaining power from the uncommitted reserves stored in the Colorado River Storage Project system, and 3) delaying construction pending completion of environmental studies. *National Wildlife Federation v. Andrus*, 440 F. Supp. 1245 (D.D.C. 1977).

Whether a final environmental impact statement for the Strawberry Aqueduct and Collection System must also include an evluation, under the criteria of section 102 of the National Environmental Policy Act, of the Bonneville Unit or perhaps even the entire Central Utah Project, is a mixed question of fact and law. Whether the Strawberry system is a unit unto itself and can stand on its own two feet or is so intertwined with the rest of the Bonneville Unit and the Central Utah Project that it is but an increment of the larger plan is essentially a fact question. Whether the "facts" as thus found by the trial court permit the Strawberry system to be classified as an independent "major Federal action" is essentially a question of law. *Sierra Club v. Stamm*, 507 F.2d 788 (10th Cir. 1974).

The Strawberry Aqueduct and Collection System has an independent utility of its own as a collection and conveyance system of waters from the designated Uinta Mountain streams for storage in the enlarged Strawberry Reservoir for release and use in the Bonneville Basin. Such system can operate and function separately from the remaining unconstructed systems of the Bonneville Unit or other units of the Central Utah Project. The termini of the Strawberry system, comprising the Soldier Creek Dam on the westerly end and the Upper Stillwater Reservoir on the easterly end, delineate a reasonable and logical segment of the Bonneville Unit for discussion and analysis of the environmental impacts resulting therefrom, which remain unchanged regardless of the systems to be constructed for delivery and use of project waters within the Bonneville Basin. Thus, the Strawberry system is an independent "major Federal action" for the purposes of section 102 of the National Environmental Policy Act and the Bureau of Reclamation's final environment impact statement sufficiently covered the Currant Creek Dam feature of the Strawberry Aqueduct and Collection system by discussing the entire Strawberry system. It was not required to evaluate the Bonneville Unit or the Central Utah Project. *Sierra Club v. Stamm*, 507 F.2d 788 (10th Cir. 1974).

The environmental impact statement for the Strawberry Aqueduct and Collection System, Bonneville Unit, Central Utah Project, which devoted over 100 pages to alternatives to the entire Bonneville Unit plan, including possible alternatives to the Currant Creek Dam (the particular system feature whose construction had been challenged), provided a good faith, objective and reasonable discussion of alternatives. The environmental impact statement is not required to consider alternatives whose effects cannot reasonably be ascertained and whose implementation is deemed remote and speculative. Rather the statement need set forth only those alternatives "sufficient to permit a reasoned choice." *Sierra Club v. Stamm*, 507 F.2d 788 (10th Cir. 1974).

The environmental impact statement for the Strawberry Aqueduct and Collection System, Bonneville Unit, Central Utah Project, was not required to contain a cost-benefit ratio. The National Environmental Policy Act requires only that "presently unquantified environmental amenities and values . . . be given appropriate consideration in decisionmaking along with economic and technical considerations." This does not require the fixing of a dollar figure to either environmental losses or benefits. *Sierra Club v. Stamm*, 507 F.2d 788 (10th Cir. 1974).

Whether the National Environmental Policy Act is to be retroactively applied, so that the continuing operation of the Glen Canyon Dam is deemed a major Federal action "significantly affecting the quality of the human environment" and therefore requiring an environmental impact statement is a question which must be determined, in the first instance, by the Department of the Interior, the agency operating the project. Until such determination has been made or the Department has in some formal manner indicated its refusal to make it, the challenge to the Dam's continuing operation is not ripe for judicial consideration. *Grand Canyon Dorries, Inc. v. Walker*, 500 F.2d 588 (10th Cir. 1974).

5. Excess land laws

Where the construction of a Federal Reclamation project will partly flood out facilities being used to supply water to private lands served by an irrigation district, the use of Federal project works to continue service to these lands does not subject them to the excess land law. Memorandum of Solicitor to Assistant Secretary, Land and Water Resources, September 13, 1977, in re Dolores Project—project repayment contract.

6. Navajo Dam

As the Colorado River Storage Project Act specifically authorizes only the construction of the Navajo dam and reservoir across the San Juan River and the legislative history demonstrates that Congress intended to preclude the use of the dam for power purposes, the construction of a 23-megawatt powerplant at the Navajo Dam to serve the sprinkler irrigation system of the Navajo Indian Irrigation Project cannot be deemed authorized merely because (1) the Senate Committee Report for the Act of September 25, 1970 states that the Navajo Indian Irrigation Project "includes a powerplant at Navajo Dam," where the Act itself makes no mention of a powerplant, (2) the dam was designed and constructed to allow later installation of a powerplant, or (3) from 1974 to 1977 Congress appropriated funds for the plant, but never statutorily authorized it. *National Wildlife Federation v. Andrus,* 440 F. Supp. 1245 (D.D.C. 1977).

7. Dallas Creek Project

As the general purpose of the Colorado River Storage Project Act includes the development of water resources for the generation of hydroelectric power and the authorization of the Dolores and Dallas Creek projects in section 1 of the Act provides that such projects are to include power generating and transmission facilities related thereto, no further authorization is required for the construction of hydroelectric facilities at McPhee Dam (Dolores Project) and Ridgway Dam (Dallas Creek Project). Memorandum of Associate Solicitor Little to Commissioner, Water and Power Resources Service, July 3, 1980.

8. Dolores Project

As the general purpose of the Colorado River Storage Project Act includes the development of water resources for the generation of hydroelectric power and the authorization of the Dolores and Dallas Creek projects in section 1 of the Act provides that such projects are to include power generating and transmission facilities related thereto, no further authorization is required for the construction of hydroelectric facilities at McPhee Dam (Dolores Project) and Ridgway Dam (Dallas Creek Project). Memorandum of Associate Solicitor Little to Commissioner, Water and Power Resources Service, July 3, 1980.

9. San Juan-Chama Project

The fact that the Act of March 26, 1964 authorized permanent storage at Cochiti Reservoir of 50,000 acre feet of San Juan-Chama water, plus annual additions sufficient to offset evaporation, for recreation, fish and wildlife purposes, combined with the fact that section 1401 of the Reclamation Development Act of 1974 authorizes the release of water from Heron Reservoir to provide up to 50,000 acre feet plus evaporation loss annually to Elephant Butte for a recreation pool, does not demonstrate that storage at Elephant Butte is prohibited absent express Congressional authorization. Storage at Elephant Butte for purposes which are Congressionally authorized and which constitute beneficial uses under State law would not violate the provisions of the Colorado River Storage Project Act and the Act of June 13, 1962. Rather, the Act of March 26, 1964 and section 1401 of the Reclamation Development Act were passed in order to provide authorization because water was to be released without a contract as required by section 11 of the Act of June 13, 1962 and to be used solely for recreational purposes. It cannot be inferred from these statutes that water received by contract purchasers is not to be stored at Elephant Butte for municipal, industrial, or irrigation purposes. *Jicarilla Apache Tribe v. United States,* 657 F.2d 1126 (10th Cir. 1981).

Because Congress has used both the term "municipal" and the term "recreational" with regard to the purposes for which water from the San Juan-Chama Project may be used, and as these terms have distinct meanings, the mere fact that excess water is to be stored at the Elephant Butte Reservoir for recreational purposes by the City of Albuquerque does not transform a recreational use into a municipal use. Considering that, under the Colorado River Storage Project Act, recreation use is only incidental to municipal use, recreation, whether provided by Albuquerque or otherwise, could not justifiably constitute the only use of a large amount of San Juan-Chama water. *Jicarilla Apache Tribe v. United States,* 657 F.2d 1126 (10th Cir. 1981).

It is clear from sections 1 and 8 the Colorado River Storage Project Act and sections

1 and 8 of the Act of June 13, 1962 that the principal uses for San Juan-Chama Project water are for irrigation, municipal, industrial, and domestic purposes, and all other uses, including recreation and fish and wildlife, are merely incidental. Thus, the storage in the Elephant Butte Reservoir of water purchased by Albuquerque from the Heron Reservoir is prohibited where the sole purpose is for recreational use even assuming such storage would be permitted under the law of New Mexico. *Jicarilla Apache Tribe v. United States,* 657 F.2d 1126 (10th Cir. 1981).

Nothing in section 301(b) of the Water Supply Act of 1958 suggests that a municipality, such as the City of Albuquerque, may place, solely for recreational purposes, the excess water it receives from the Heron Reservoir, San Juan-Chama Project, into storage in the Elephant Butte Reservoir. Even if the statute is read to permit storage by a municipality for any purpose, the specific terms and conditions of the Colorado River Storage Project Act and the Act of June 13, 1962, which make recreational use only incidental to the primary purposes of municipal, industrial, and irrigation uses, override conflicting authority in section 301(b). *Jicarilla Apache Tribe v. United States,* 657 F.2d 1126 (10th Cir. 1981).

Assuming that the Federal Water Project Recreation Act, which authorizes consideration of opportunities for recreation and wildlife enhancement, applies to San Juan-Chama Project water, nothing in the statute authorizes storage solely for recreational purposes. The statute does not suggest that the specific limitations of the Colorado River Storage Project Act and the Act of June 13, 1962, which make recreational use only incidental to irrigation, municipal, and industrial use, should be ignored in favor of recreation or wildlife. *Jicarilla Apache Tribe v. United States,* 657 F.2d 1126 (10th Cir. 1981).

Pages 1249-1250

Sec. 2. [Planning reports—Priority—Reports to States, President, and Congress.]—In carrying out further investigations of projects under the Federal reclamation laws in the Upper Colorado River Basin, the Secretary shall give priority to completion of planning reports on the Gooseberry, Eagle Divide, Bluestone, Battlement Mesa, Grand Mesa, Yellow Jacket, Basalt Middle Park (including the Troublesome, Rabbit Ear, and Azure units), Upper Gunnison (including the East River, Ohio Creek, and Tomichi Creek units), Lower Yampa (including the Juniper and Great Northern units), Upper Yampa (including the Hayden Mesa, Wessels, and Toponas units) and Sublette (including a diversion of water from the Green River to the North Platte River Basin in Wyoming), Ute Indian unit of the Central Utah Project, San Juan County (Utah), Price River, Grand County (Utah), Gray Canyon, and Juniper (Utah) participating projects: *Provided,* That the planning report for the Ute Indian unit of the Central Utah participating project shall be completed on or before December 31, 1974, to enable the United States of America to meet the commitments heretofore made to the Ute Indian Tribe of the Uintah and Ouray Indian Reservation under the agreement dated September 20, 1965 (Contract Numbered 14–06–W–194). Said reports shall be completed as expeditiously as funds are made available therefor and shall be submitted promptly to the affected States, which in the case of the San Juan-Chama project shall include the State of Texas, and thereafter to the President and the Congress: *Provided,* That with reference to the plans and specifications for the San Juan-Chama project the storage for control and regulation of water imported from the San Juan River shall (1) be limited to a single offstream dam and reservoir on a tributary of the Chama River, (2) be used solely for control and regulation and no power facilities shall be established, installed or operated thereat, and (3) be operated at all times by the Bureau of Reclamation of the Department of the Interior in strict compliance with the Rio Grande Compact as administered by the Rio Grande Compact Commission. The preparation of detailed designs and specifications for the works proposed to be constructed in connection with projects shall be carried as far forward as the investigations thereof indicate is reasonable in the circumstances.

[Juniper project.]—The Secretary, concurrently with the investigations directed by the preceding paragraph, shall also give priority to completion of a planning report on the Juniper project. (70 Stat. 106; Act of June 13, 1962, 76 Stat. 102; Act of September 2, 1964, 78 Stat. 852; § 501(a), Act of September 30, 1968, 82 Stat. 896; 43 U.S.C. § 620a)

EXPLANATORY NOTES

1968 Amendment. Section 501(a) of the Colorado River Basin Project Act of September 30, 1968 (Public Law 90-537, 82 Stat. 897) amended section 2 by:

(1) deleting "Parshall, Troublesome, Rabbit Ear, San Miguel, West Divide, Tomichi Creek, East River, Ohio Creek, Dallas Creek, Dolores, Fruit Growers Extension, Animas La-Plata";

(2) inserting "Basalt Middle Park (including the Troublesome, Rabbit Ear, and Azure units), Upper Gunnison (including the East River, Ohio Creek, and Tomichi Creek Units), Lower Yampa (including the Juniper and Great Northern units), Upper Yampa (including the Hayden Mesa, Wessels, and Toponas units)" following "Yellow Jacket";

(3) inserting "(including a diversion of water from the Green River to the North Platte River Basin in Wyoming), Ute Indian unit of the Central Utah Project, San Juan County (Utah), Price River, Grand County (Utah), Gray Canyon, and Juniper (Utah)" following "Sublette"; and

(4) adding the first proviso.

The 1968 Act appears in Volume IV in chronological order.

Supplementary Provisions: Storage of San Juan-Chama Project Water. Section 5 of the Act of December 29, 1981 (Public Law 97-140, 95 Stat. 1717) provided that the proviso in section 2 of the text shall not be construed to prohibit storage of San Juan-Chama Project water acquired by contract under Public Law 87-483 (Act of June 13, 1962, 76 Stat. 96, authorizing construction of the Navajo Indian Irrigation Project and Initial Stage of the San Juan-Chama Project as participating projects of the Colorado River Storage Project) in any reservoir, including storage of water for recreation and other beneficial purposes by any contracting party. The 1981 Act also authorized agreements with entities contracting for San Juan-Chama Project water by the Secretary of the Army, and the Secretary of the Interior, for storage of such water in Abiquiu Reservoir, and Elephant Butte Reservoir, respectively; authorized the Secretary of the Interior to release Project water to contracting entities for such storage; provided for payment of increased O & M costs attributable to such storage; and required evaporation loss and spill chargeable to such storage to be accounted for as required by the Rio Grande Compact. The 1981 Act appears in Volume IV in chronological order.

NOTES OF OPINIONS

1. San Juan-Chama Project, limitations on storage

The limitations on storage of water from the San Juan River imposed by the proviso of section 2 of the Colorado River Storage Project Act do not prohibit storage of San Juan-Chama project water anywhere besides Heron Reservoir. The studies preceding authorization of the project demonstrate that the purpose of this proviso was to prevent commingling of San Juan-Chama and Rio Grande Basin waters and to permit accurate measurement of the quantity of imported water. Moreover, section 8 of the Act of June 13, 1962 suggests that, in addition to the storage and regulation facility at Heron Reservoir, water use facilities were contemplated, including reservoirs and dams. *Jicarilla Apache*

Tribe v. United States, 657 F.2d 1126 (10th Cir. 1981).

Language in section 2 of the Colorado River Storage Project Act that "with reference to the plans and specifications for the San Juan-Chama Project, the storage for control and regulation of water imported from the San Juan River shall (1) be limited to a single offstream dam and reservoir on a tributary of the Chama River . . ." does not prohibit the City of Albuquerque, a purchaser of San Juan-Chama water from the Heron Reservoir, from storing a portion of its future water requirements at the Corps of Engineers' Jemez Reservoir, as such storage would not involve the construction of any additional dam or reservoir and because storing water by exchange at Jemez Reservoir would not be for the control and regulation of imported water. Memorandum of Associate Solicitor Robison to Field Solicitor, Albuquerque, June 27, 1972.

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Sec. 3. [Congressional intent.]—

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NOTE OF OPINION

1. Rainbow Bridge

Congress has repealed the last sentence of section 3 of the Colorado River Storage Project Act and the proviso of section 1(2) of that Act, both designed to protect the Rainbow Bridge, by (1) disallowing from the Public Works Appropriation Act, 1961, an appropriation to initiate construction of facilities to protect Rainbow Bridge National Monument after specifically finding that the impoundment of water in Glen Canyon Reservoir would not result in any structural damage to the bridge, and (2) including in the 1961 Appropriations Act and all subsequent public works appropriations acts through 1973 a proviso prohibiting the use of funds appropriated for the Upper Colorado River Basin Fund for construction or operation of facilities to prevent waters of Lake Powell from entering any national monument. Nor can a court order that the Glen Canyon Dam be operated at a reduced level so that the lake would not exceed the level at which it reaches the outer boundary of the monument, as this would have the effect of placing the Glen Canyon facilities, as related to others in the overall system, at about one-half design capacity. To so radically change the effectiveness of the principal regulating reservoir would prevent the attainment of the objectives of the Colorado River compacts, the Colorado River Storage Project Act, and the Colorado River Basin Project Act. *Friends of the Earth v. Armstrong,* 485 F.2d 1 (10th Cir. 1974), cert. denied, 414 U.S. 1171 (1974); accord *Badoni v. Higginson,* 455 F. Supp. 641 (D. Utah 1977), aff'd 638 F.2d 172 (10 Cir. 1980), cert. denied 452 U.S. 954 (1981).

Pages 1250-1252

Sec. 4. [Reclamation laws govern except for 50-year repayment period, organization's taxing power required, municipal water supply contracts, and Indian lands—Surplus crops—Colorado River Compact, Upper Colorado River Basin Compact, and Mexican Treaty.]—

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NOTES OF OPINION

2. Reclamation laws

The provision in section 4 of the Colorado River Storage Project Act that the Federal Reclamation laws are to govern the construction, operation and maintenance of the project incorporates section 9(c) of the

Reclamation Project Act of 1939. Section 9(c) imposes a number of restrictions on the marketing of power from the project, including the priority accorded to public utilities (preference customers), which is by now an important aspect of Federal Reclamation projects. *Arizona Power Authority v. Morton*, 549 F. 2d 1231, 1237 (9th Cir. 1977), cert. denied sub nom. *Arizona Power Authority v. Andrus*, 434 U.S. 835 (1977).

Subsection 9(c) of the Reclamation Project Act of 1939 which, under section 4 of the Colorado River Storage Project Act, is expressly made applicable to projects governed by the latter Act, vests broad authority in the Secretary to fix the rates at which electric power from Reclamation projects is sold. Thus, where the government realizes substantial savings by entering into wheeling contracts with local utilities in lieu of constructing an all-Federal transmission system for the Colorado River Storage Project, but, in the case of the Cities of Bountiful, Provo and St. George, Utah, the cost of connecting to the utilities' system will be greater than it would have been for connecting to the all-Federal system, the Secretary has discretionary authority to defray such additional costs out of the savings realized by entering into contracts with the affected preference customers which would reduce their charges for project power by the amount of their additional costs. Dec. Comp. Gen. B-170905 (November 2, 1970).

Pages 1252-1254

Sec. 5. (a) [Basin fund.]—

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(b) [Appropriations to be credited to fund.]—

* * * * *

(c) [Availability of revenues.]—

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(d) [Returns to Treasury.]—Revenues in the Basin Fund in excess of operating needs shall be paid annually to the general fund of the Treasury to return—

* * * * *

(5) the costs of each salinity control unit or separable feature thereof payable from the Upper Colorado River Basin Fund in accordance with sections 205(a)(2), 205(a)(3), and 205(c) of the Colorado River Salinity Control Act.

(e) [Apportionment of revenues.]—

* * * * *

(f) [Interest rate.]—

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EXPLANATORY NOTE

1974 Amendment. Section 205(d) of the Colorado River Basin Salinity Control Act of June 24, 1974 (Public Law 93-320, 88 Stat. 223) amended subsection (d) by adding paragraph (5) as it appears above. The 1974 Act appears in Volume IV in chronological order.

NOTES OF OPINIONS

Interest rates 3
Power rates 4
Use of reclamation fund 5

3. Interest rates

Secretarial Order No. 2929 (1970), which establishes rates for repayment on new Federal power projects or replacements of and additions to existing projects, does not supersede the interest rate provision of section 5 (f) of the Colorado River Storage Project Act as the order specifies that it applies only to projects in which the administrative discretion to establish interest rates is vested in the Secretary of Interior and section 5 (f) provides that such interest rates shall be determined by the Secretary of the Treasury. Memorandum of Associate Solicitor Little to Commissioner, Water and Power Resources Service, December 16, 1980.

4. Power rates

In making studies for the development of power rates for the Colorado River Storage Project it is proper to assume ultimate development, which includes the estimated cost of all authorized participating projects, and to accumulate excess revenues in the Basin Fund in accordance with the apportionment formula in section 5(e) of the Project Act. Memorandum of Western Area Power Administration General Counsel Hine, December 19, 1980, in re Colorado River Project rate increase based upon the 1977 repayment study.

5. Use of reclamation fund

The specific references to the general fund of the Treasury in section 5 show clearly that Congress intended the Upper Colorado River Basin Fund to be financed from the general fund and therefore preclude transfer of funds in the reclamation fund to the Basin Fund. With regard to section 8, however, inasmuch as (1) the Project is a Reclamation project governed by Reclamation law, (2) construction of the recreation and fish and wildlife facilities thereunder is an authorized project purpose, (3) section 5(a) specifically provides that the Basin Fund shall not be used to carry out the provisions of section 8, and (4) the reclamation fund is money "in the Treasury not otherwise appropriated" within the meaning of section 12, the reclamation fund is available for appropriation to carry out the purposes of section 8. Memorandum of Associate Solicitor Good to Commissioner, September 8, 1982.

Pages 1254-1255

Sec. 6. [Cost allocations—Navajos—Report to Congress.]—

* * * * *

NOTE OF OPINION

3. Costs of recreation and fish and wildlife purposes

The legislative history of the Act of June 13, 1962 demonstrates that Congress recognized the critical shortage of water in the Rio Grande Basin and that the language in sections 1 and 8 of that Act was deliberately intended to make recreation and fish and wildlife benefits incidental to municipal, industrial and agricultural water use. Thus, the 1962 Act and its history fail to support a finding that water for recreation and fish and wildlife purposes was not directly allocated by that Act solely to limit Federal expenditures because, under section 8 of the Colorado River Storage Project Act, such allocations would make a proportionate share of such project costs nonreimbursable, while the expense of water allocated to municipal water supply must be recovered under section 6 of the Project Act. *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126 (10th Cir. 1981).

Pages 1255-1256

Sec. 7. [Power plant operations.]

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NOTES OF OPINIONS

Allocation of power 3
Power rates 1

1. Power rates

Subsection 9(c) of the Reclamation Project Act of 1939 which, under section 4 of the Colorado River Storage Project Act, is expressly made applicable to projects governed by the latter Act, vests broad authority in the Secretary to fix the rates at which electric power from Reclamation projects is sold. Thus, where the government realizes substantial savings by entering into wheeling contracts with local utilities in lieu of constructing an all-Federal transmission system for the Colorado River Storage Project, but, in the case of the Cities of Bountiful, Provo and St. George, Utah, the cost of connecting to the utilities' system will be greater than it would have been for connecting to the all-Federal system, the Secretary has discretionary authority to defray such additional costs out of the savings realized, by entering into contracts with the affected preference customers which would reduce their charges for project power by the amount of their additional costs. Dec. Comp. Gen. B-170905 (November 2, 1970).

3. Allocation of power

The Colorado River Storage Project Act (CRSP) contains no prohibition against geographic preferences in the allocation and sale of power, nor does the legislative history show a clear legislative intent to prohibit such preferences. Consequently, as there is "no law to apply" under 5 U.S.C. §701(a)(2), there is no judicial review of the CRSP Marketing Criteria which allocate only 20 percent of summer CRSP power and 7 percent of the winter supply to the southern division States of Arizona, California and Nevada. *Arizona Power Authority v. Morton*, 549 F.2d 1231 (9th Cir. 1977), cert. denied sub nom. *Arizona Power Authority v. Andrus*, 434 U.S. 835 (1977).

Pages 1256-1257

Sec. 8. [Recreational and fish and wildlife facilities.]—In connection with the development of the Colorado River storage project and the participating projects, the Secretary is authorized and directed to investigate, plan, construct, operate, and maintain (1) public recreational facilities on lands withdrawn or acquired for the development of said project or of said participating projects, to conserve the scenery, the natural, historic, and archeologic objects, and the wildlife on said lands, and to provide for public use and enjoyment of the same and of the water areas created by these projects by such means as are consistent with the primary purposes of said projects; and (2) facilities to mitigate losses of, and improve conditions for, the propagation of fish and wildlife. The Secretary is authorized to acquire lands necessary for the construction, operation, and maintenance of the facilities herein provided, and to dispose of them to Federal, State, and local governmental agencies by lease, transfer, exchange, or conveyance upon such terms and conditions as will best promote their development and operation in the public interest. All costs incurred pursuant to this section shall be nonreimbursable and nonreturnable. (70 Stat. 110; Act of October 21, 1976, 90 Stat. 2792; 43 U.S.C. §620g).

EXPLANATORY NOTE

1976 Amendment. Section 704(a) of the Federal Land Policy and Management Act of 1976 (Act of October 21, 1976, Public Law 94-579, 90 Stat. 2792) amended section 8 by deleting the words "and to withdraw public lands from entry or other disposition under the public land laws" from the next-to-last sentence. Extracts from the 1976 Act, including section 704(a), appear in Volume IV in chronological order.

NOTES OF OPINIONS

Archeological conservation 1
Costs of recreation and fish and wildlife purposes 2
NEPA compliance 3
San Juan-Chama Project, authorized purposes of storage 4
Use of reclamation fund 5

1. Archeological conservation

Funding from section 8 of the Colorado River Storage Project Act of 1956 is, as a practical matter, unavailable to archaeological conservation efforts connected with the Dolores and Animas-LaPlata Projects because that section authorizes only archaeological conservation which can be accomplished through the establishment of public recreational facilities. However, funding is available through the Act of June 27, 1960 (74 Stat. 220), as amended by Public Law 93-291, but is limited to a maximum of one per cent of the amount authorized to be appropriated for the projects. Memorandum of Associate Solicitor Leshy to Commissioner, Water and Power Resources Service, April 11, 1980.

2. Costs of recreation and fish and wildlife purposes

The legislative history of the Act of June 13, 1962 demonstrates that Congress recognized the critical shortage of water in the Rio Grande Basin and that the language in sections 1 and 8 of that Act was deliberately intended to make recreation and fish and wildlife benefits incidental to municipal, industrial and agricultural water use. Thus, the 1962 Act and its history fail to support a finding that water for recreation and fish and wildlife purposes was not directly allocated by the Act solely to limit Federal expenditures because, under section 8 of the Colorado River Storage Project Act such allocations would make a proportionate share of such project costs nonreimbursable, while the expense of water allocated to municipal water supply must be recovered under section 6 of that Act. *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126 (10th Cir. 1981).

3. NEPA compliance

Where one of the specific objectives of the Colorado River Storage Project Act, which authorized the Navajo Dam, is to mitigate losses of, and improve conditions for, the propagation of fish and wildlife, an environmental impact statement prepared in connection with the installation of a powerplant at the Dam was inadequate where it admitted that there would be some adverse impact on fish and wildlife, due to fluctuations in San Juan River flow rates, but failed to supply the detail necessary for informed decision making. The Bureau cannot evade assessing the environmental consequences of a project under construction by simply deferring to the results of future studies, as once a facility has been completely constructed the economic cost of any alteration may be very great, and one of the purposes of the National Environmental Policy Act was to break the cycle of such incremental decision making. *National Wildlife Federation v. Andrus*, 440 F. Supp. 1245 (D.D.C. 1977).

4. San Juan-Chama Project, authorized purposes of storage

Because Congress has used both the term "municipal" and the term "recreational" with regard to the purposes for which water from the San Juan-Chama Project may be used, and as these terms have distinct meanings, the mere fact that excess water is to be stored at the Elephant Butte Reservoir for recreational purposes by the City of Albuquerque does not transform a recreational use into a municipal use. Considering that, under the Colorado River Storage Project Act, recreation use is only incidental to municipal use, recreation, whether provided by Albuquerque or otherwise, could not justifiably constitute the only use of a large amount of San Juan-Chama water. *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126 (10th Cir. 1981).

It is clear from sections 1 and 8 of the Colorado River Storage Project Act and sections 1 and 8 of the Act of June 13, 1962 that the principal uses for San Juan-Chama Project water are for irrigation, municipal, industrial, and domestic purposes, and all other uses, including recreation and fish and wildlife, are merely incidental. Thus, storage in the Elephant Butte Reservoir of water purchased by Albuquerque from the Heron Reservoir is prohibited where the sole purpose is for recreational use even assuming such storage would be permitted under the law of New Mexico. *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126 (10th Cir. 1981).

The fact that the Act of March 26, 1964 authorized permanent storage at Cochiti Reservoir of 50,000 acre feet of San Juan-Chama water, plus annual additions sufficient to offset evaporation, for recreation, fish and wildlife purposes, combined with the fact that section 1401 of the Reclamation Development Act of 1974 authorizes the release of water from Heron Reservoir to provide up to 50,000 acre feet plus evaporation loss annually to Elephant Butte for a recreation pool, does not demonstrate that storage at Elephant Butte is prohibited absent express Congressional authorization. Storage at Elephant Butte for purposes which are Congressionally authorized and which constitute beneficial uses under State law would not violate the provisions of the Colorado River Storage Project Act and the Act of June 13, 1962. Rather, the Act of March 26, 1964 and section 1401 of the Reclamation Development Act were passed in order to provide authorization because water was to be released without a contract as required by section 11 of the Act of June 13, 1962 and to be used solely for recreational purposes. It cannot be inferred from these statutes that water received by contract purchasers is not to be stored at Elephant Butte for municipal, industrial, or irrigation purposes. *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126 (10th Cir. 1981).

Assuming that the Federal Water Project Recreation Act, which authorizes consideration of opportunities for recreation and wildlife enhancement, applies to San Juan-Chama Project water, nothing in the statute authorizes storage solely for recreational purposes. The statute does not suggest that the specific limitations of the Colorado River Storage Project Act and the Act of June 13, 1962, which make recreational use only incidental to irrigation municipal and industrial use, should be ignored in favor of recreation or wildlife. *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126 (10th Cir. 1981).

Nothing in section 301(b) of the Water Supply Act of 1958 suggests that a municipality such as the City of Albuquerque may place, solely for recreational purposes, the excess water it receives from the Heron Reservoir, San Juan-Chama Project, into storage in the Elephant Butte Reservoir. Even if the statute is read to permit storage by a municipality for any purpose, the specific terms and conditions of the Colorado River Storage Project Act and the Act of June 13, 1962, which make recreational use only incidental to the primary purposes of municipal, industrial, and irrigation uses, override conflicting authority in section 301(b). *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126 (10th Cir. 1981).

5. Use of reclamation fund

The specific references to the general fund of the Treasury in section 5 show clearly that Congress intended the Upper Colorado River Basin Fund to be financed from the general fund and therefore preclude transfer of funds in the reclamation fund to the Basin Fund. With regard to section 8, however, inasmuch as (1) the Project is a Reclamation project governed by Reclamation law, (2) construction of the recreation and fish and wildlife facilities thereunder is an authorized project purpose, (3) section 5(a) specifically provides that the Basin Fund shall not be used to carry out the provisions of section 8, and (4) the reclamation fund is money "in the Treasury not otherwise appropriated" within the meaning of section 12, the reclamation fund is available for appropriation to carry out the purposes of section 8. Memorandum of Associate Solicitor Good to Commissioner, September 8, 1982.

Page 1257

Sec. 10. [Waiver of soil survey and land classification.]—

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EXPLANATORY NOTE

Change of Name. Section 7 of the Act of October 3, 1980 (Public Law 96–375, 94 Stat. 1507) substituted "Wayne N. Aspinall" for "Curecanti". The 1980 Act appears in Volume IV in chronological order.

Page 1258

Sec. 12. [Appropriation.]—There are hereby authorized to be appropriated, out of any moneys in the Treasury not otherwise appropriated, such sums as may be required to carry out the purposes of this Act, but not to exceed $760,000,000. (70 Stat. 110; 43 U.S.C. § 620k)

EXPLANATORY NOTES

Error in the Text of Volume II. The last line of the text of section 12, as printed in Volume II at page 1258, is not correct. Section 12 should read as it appears above.

1972 Appropriation Increase. The amount which section 12 authorizes to be appropriated was further increased by $610,000,000 by the Act of August 10, 1972 (Public Law 92–370, 86 Stat. 525). The money is to be used for the completion of the construction of the Wayne N. Aspinall, Flaming Gorge, Glen Canyon, and Navajo units, and transmission division of the Colorado River storage project, and for completion of construction of the following participating projects: Central Utah (initial phase—Bonneville, Jensen, Upalco, and Vernal units), Emery County, Florida, Hammond, La Barge, Lyman, Paonia, Seedskadee, Silt, and Smith Fork. The 1972 Act appears in Volume IV in chronological order.

1968 Appropriation Increase. The amount which section 12 authorizes to be appropriated was further increased by $392,000,000 by the Act of September 30, 1968 (Public Law 90–537, 82 Stat. 897). The money is to be used for construction of the Animas-La Plata, Dolores, Dallas Creek, West Divide, and San Miguel projects. The 1968 Act appears in Volume IV in chronological order.

DRAINAGE AND MINOR CONSTRUCTION

Page 1269

[Use of funds for drainage facilities and other minor items—Waiting period for contract of over $200,000.]—

* * * * *

NOTE OF OPINION

1. Repayment contracts

The phrase "notwithstanding any other law" in the Drainage and Minor Construction Act and in section 1 of the Rehabilitation and Betterment Act exempts the Secretary of the Interior, in contracting with a water users' organization for the performance of rehabilitation and betterment work, from restrictions contained in general provisions of the law. Thus, the wage and hour provisions established by the Copeland Act and the Contract Work Standards Act can be omitted from Reclamation repayment contracts executed under the former Acts as a matter of discretion granted to the Secretary by those Acts. Memorandum of Acting Associate Solicitor Davis to Commissioner of Reclamation, July 18, 1968.

1273

PUBLIC WORKS APPROPRIATION ACT, 1957

Page 1273

[Savage Rapids Dam—Hayden Lake unit.]—

*   *   *   *   *

EXPLANATORY NOTE

Supplementary Provision: Improvement of Fish Way. Title XII of the Reclamation Development Act of October 27, 1974 (Public Law 93-493, 88 Stat. 1486) authorizes the Secretary of the Interior to construct an improved anadromous fish passage at the Savage Rapids Dam. The Grants Pass Irrigation District is responsible for operation and maintenance of the facility, and the appropriation of $851,000 (April 1974 price levels) authorized for construction is nonreimbursable. The 1974 Act appears in Volume IV in chronological order.

1275-1276

ADMINISTRATION OF CONTRACTS UNDER SECTION 9, RECLAMATION PROJECT ACT OF 1939

Pages 1275-1276

[Sec. 1. Reclamation projects—Administration of contracts.]—In administering section 9, subsections (d) and (e) of the Reclamation Project Act of 1939 (53 Stat. 1187, 1195), the Secretary of the Interior shall—

* * * * *

(5) provide for payment of rates under any contract entered into pursuant to said subsection (e) in advance of delivery of water on an annual, semiannual, bimonthly, or monthly basis as specified in the contract.

* * * * *

(70 Stat. 483; § 8, Act of October 3, 1980, 94 Stat. 1507; 43 U.S.C. § 485h-1)

EXPLANATORY NOTE

1980 Amendment. Section 8 of the Act of October 3, 1980 (Public Law 96–375, 94 Stat. 1507) amended section 1(5) of the Act of July 2, 1956 to provide for payment of rates on a bimonthly or monthly basis in addition to an annual or semiannual basis, as specified in contracts entered into pursuant to section 9(e) of the Reclamation Project Act of 1939. The 1980 Act appears in Volume IV in chronological order.

FEDERAL WATER POLLUTION CONTROL ACT

Pages 1278-1306

[Editor's Note: The Federal Water Pollution Control Act was completely revised by the Federal Water Pollution Control Act Amendments of 1972, Public Law 92–500, 86 Stat. 816. It has also been amended a number of times before and since 1972. For editorial convenience, extracts are set forth in Volume IV in chronological order under the Amendments enacted on October 18, 1972 as they appear in Chapter 26 of Title 33 of the United States Code as of January 13, 1983 (33 U.S.C., 1982 ed.).]

INVOLUNTARY ACQUISITION OF EXCESS LAND

Page 1307

Explanatory Notes

Supplementary Provision: Changes in Acreage Limitations, Pricing and Contracts. The Reclamation Reform Act of 1982 (Title II, Act of October 12, 1982, Public Law 97-293, 96 Stat. 1261, 1263, 43 U.S.C. §§ 390aa et seq.) makes major changes in the acreage limitations on, the pricing of, and the contracts for the delivery of irrigation water from Reclamation projects. Among these, section 216 of the 1982 Act deals with lands acquired by involuntary process of law, conveyance in satisfaction of debt, inheritance or devise. The 1982 Act appears in Volume IV in chronological order.

Editor's Note, Annotation of Opinions. Annotations of opinions interpreting sections 1 and 2 of this Act ordinarily would appear only under the Acts that it amended, i.e., the Acts of August 9, 1912 and May 25, 1926. However, in view of the significance of the Act of July 11, 1956, the following annotations are also repeated here.

Notes of Opinions

Divorce 1
Inheritance 2
Price approval 3

1. Divorce

Where, as a result of a divorce decree, the wife quitclaimed her one-half interest in 310.4 acres, the wife's interest in the property did not come within the Act of July 11, 1956, which allows water service not to exceed five years without regard to the acreage limitation where land is acquired by foreclosure or other process of law, by conveyance in satisfaction of mortgages, or by inheritance or devise. Accordingly, the husband acquired his wife's interest in the 310.4 acres into excess status and he holds 150.4 acres in excess status. If water service to the 150.4 acres of excess land is to be eligible for project water in the hands of the purchasers, the land must be sold at a price not reflecting project benefits in accordance with section 46 of the Omnibus Adjustment Act. Memorandum of Associate Solicitor Leshy to Commissioner, May 30, 1980, in re request for sale price approval—Gene D. Reichert and Reichert Farms, Inc., to Duane D. and June M. Roechs—Columbia Basin Project, Washington.

2. Inheritance

Where five brothers became excess landowners upon the death of their mother, who herself was an excess landholder, they were entitled, pursuant to the Act of July 11, 1956, to the temporary delivery of water only with respect to the portion of their mother's holdings which were nonexcess in her hands. They were not entitled to receive temporary water service for the portion of each of their holdings representing excess lands held by their mother during her life. Congress did not intend to put the heir in a better position than the testator had enjoyed. The brothers could not execute recordable contracts upon the portion of their holdings which became excess upon inheritance, inasmuch as initial delivery of water from the project had begun prior to the time that the brothers had inherited the land. Memorandum of Associate Solicitor Morthland to Assistant Regional Solicitor, Sacramento, September 30, 1969, in re excess lands: application of section 1 of the Act of July 11, 1956 to lands inherited by Thomas Perez, et al. (Westlands Water District).

3. Price approval

If land which formerly was excess and was sold into nonexcess status with Secretarial approval of the price before the Solicitor's Opinion of May 18, 1979, 86 I.D. 307, is thereafter acquired involuntarily into excess status, no approval of the price is required if it is sold within five years of the date of involuntary acquisition, but price approval is required if it is sold after five years. If formerly excess land which was sold into nonexcess status with Secretarial price approval after May 18, 1979, is thereafter acquired involuntarily into excess status, price approval is required for the sale whenever it occurs. This approach fairly balances the purpose of the 1956 Act with the Congressional intent of limiting speculation in lands served with project water and precludes the possibility of windfalls accruing to those who involuntarily acquire formerly excess land into excess status. Memorandum of Solicitor Krulitz, August 7, 1979, supplemented by Memorandum of Associate Solicitor Leshy, January 17, 1980, in re control of the sale price of formerly excess land involuntarily acquired into excess status.

The purpose of the Act of July 11, 1956, which amended section 3 of the Act of August 9, 1912 and section 46 of the Act of May 25, 1926, was to allow delivery of water for five years to excess lands involuntarily acquired by foreclosure, inheritance, or devise. Under both the 1912 Act and 1926 Acts, during the five-year period from the effective date of acquisition, the mortgagee, heir, or devisee is given the opportunity to unburden itself of holdings acquired in this manner just as if they were non-excess. There is no requirement of the 1912 Act as so amended that lands acquired in the manner described ever be sold at a price approved by the Secretary. Under the 1926 Act as amended, at the end of the five-year period, the price at which the land subject to the 1926 Act is sold must be approved by the Secretary. During the first five years, under that Act, there is no requirement that the Secretary approve the price at which lands involuntarily acquired are sold. Memorandum of Deputy Solicitor Weinberg to Regional Solicitor, Sacramento, December 15, 1967, in re price approval of excess land sold by mortgagee after foreclosure.

WASHOE PROJECT

Page 1318

[Sec. 1. Washoe reclamation project, Nev.-Calif.]—

* * * * *

EXPLANATORY NOTE

Codification Omitted. The Act of August 1, 1956 (70 Stat. 775), authorizing the Washoe Project, originally was codified at 43 U.S.C. §§ 614-614d but was omitted from the 1976 and subsequent editions of the U.S. Code as having limited applicability.

NOTES OF OPINIONS

Authorized purposes of water supply 1-5
  Endangered species 2
  Generally 1
  Water Supply Act 3

1. Authorized purposes of water supply—Generally

The supply of water from the Washoe Project for municipal and industrial purposes is authorized as a "beneficial use." *Carson-Truckee Water Conservancy District v. Watt*, 537 F. Supp. 106, 112-13 (D. Nev. 1982).

Contrary to the observations of the prior memoranda of Solicitor Martz on December 23, 1980 and January 19, 1981, authority to allocate Stampede Reservoir water for municipal and industrial uses in Reno and Sparks, Nevada, is provided by the Washoe Project Act. Section 1 of the Washoe Project Act, which provides for the furnishing of water "for other beneficial purposes," authorizes use of project water for municipal and industrial use. Moreover, the project feasibility report, which is incorporated in the legislative history of the Act, includes "improvement of public health" as one of the other beneficial purposes, which would imply the use of some water for municipal and industrial purposes designed to improve the health and environment of the community. Memorandum of Solicitor Coldiron to Regional Solicitor, Pacific Southwest Region, October 20, 1981.

Although the Washoe Project Act provides for the use of Stampede Reservoir water "for other beneficial purposes" and the project feasibility report (which was incorporated into the legislative history) indicates that the project's purposes were sufficiently flexible to supply certain communities with domestic water, if warranted, the report also demonstrates that the supplying of water to Reno and Sparks, Nevada, for municipal and industrial purposes was not contemplated as it was believed these communities already had adequate domestic water supplies. Memorandum of Solicitor Martz to Regional Solicitor, Pacific Southwest Region, December 22, 1980.

2. Endangered species

The obligation of the Secretary of the Interior under the Endangered Species Act to release water from Stampede Reservoir to conserve the endangered cui-ui fish population and the threatened Lahontan cutthroat trout of Pyramid Lake take priority over his obligation under the Washoe Project Act to sell water from the reservoir on a basis that will reimburse the United States for the cost of the project. *Carson-Truckee Water Conservancy District v. Watt*, 537 F. Supp. 106 (D. Nev. 1982) and 549 F. Supp. 704 (D. Nev. 1982). [Editor's Note: This holding was affirmed sub nom. *Carson-Truckee Water Conservancy District v. Clark*, 741 F. 2d 257 (1984), cert. denied, 105 S. Ct. 1842 (1985)].

Because the Endangered Species Act of 1973 is a clear Congressional mandate, the Interior Department could not execute a repayment contract for the Washoe Project which did not adequately protect the threatened and endangered species of the Truckee River System. However, development of fish and wildlife resources is only one feature of the project's expressly authorized multi-purpose scheme. Should preservation of the affected species require committing all or a substantial portion of the capacity of the Stampede Reservoir to nonreimbursable purposes, such deviation from the project purposes would require Congressional reauthorization of the Stampede Division. Memorandum of Solicitor Martz to Regional Solicitor, Pacific Southwest, January 19, 1981.

3. Water Supply Act

The Water Supply Act of 1958 does not independently authorize the sale of Stampede Reservoir water for municipal and industrial purposes as such use is not a specific purpose of the multipurpose Washoe Project and the Act specifically provides that where the modification of a reservoir project to include storage would seriously affect the authorized purposes of the project further Congressional approval is required. Memorandum of Solicitor Martz to Regional Solicitor, Pacific Southwest, January 19, 1981.

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Sec. 4. [Fish and wildlife resources—Limitation.]—

* * * * *

NOTE OF OPINION

1. *Orr Ditch* proceedings

There is nothing in the legislative history of the Washoe Project Act of 1956 to suggest that by authorizing efforts to restore the Pyramid Lake fishery Congress intended to sanction or ratify Federal actions that had contributed to the fishery's destruction, such as the Government's actions in the *Orr Ditch* proceedings. *United States v. Truckee-Carson Irrigation District*, 649 F. 2d 1286, 1311-12 (9th Cir. 1981), amended, 666 F. 2d 351 (1982), modified in other respects, *Nevada v. United States*, 463 U.S. 110 (1983).

SMALL RECLAMATION PROJECTS ACT

Pages 1331-1332

Sec. 2. [Definitions.]—As used in this Act—

(a) The term "construction" shall include rehabilitation and betterment.

(b) The term "Federal reclamation laws" shall mean the Act of June 17, 1902 (32 Stat. 388), and Acts amendatory thereof or supplementary thereto.

(c) The term "organization" shall mean a State or a department, agency, or political subdivision thereof or a conservancy district, irrigation district, water users' association, an agency created by interstate compact, or similar organization which has capacity to contract with United States under the Federal reclamation laws.

(d) The term "project" shall mean (i) any complete irrigation project, or (ii) any multiple-purpose water resource project that is authorized or is eligible for authorization under the Federal reclamation laws, or (iii) any distinct unit of a project described in clause (i) and (ii) or (iv) any project for the drainage of irrigated lands, without regard to whether such lands are irrigated with water supplies developed pursuant to the Federal reclamation laws, or (v) any project for the rehabilitation and betterment of a project or distinct unit described in clauses (i), (ii), (iii), and (iv): *Provided,* That the estimated total cost of the project described in clause (i), (ii), (iii), (iv), or (v) does not exceed the maximum allowable estimated total project cost as determined by subsection (f) hereof: *Provided further,* That a project described in clause (i), (ii), or (iii) may consist of existing facilities as distinct from newly constructed facilities, and funds made available pursuant to this Act may be utilized to acquire such facilities subject to a determination by the Secretary that such facilities meet standards of design and construction which he shall promulgate and that the cost of such existing facilities represent less than fifty per centum of the cost of the project. Nothing contained in this Act shall preclude the making of more than one loan or grant, or combined loan and grant, to an organization so long as no two such loans or grants, or combinations thereof, are for the same project, as herein defined.

(e) The term "Secretary" shall mean the Secretary of the Interior.

(f) The maximum allowable estimated total project cost of a proposal submitted during any given calendar year shall be determined by the Secretary using the Bureau of Reclamation composite construction cost index for January of that year with $15,000,000 as the January 1971 base. (70 Stat. 1044; Act of September 2, 1966, 80 Stat. 376; Act of November 24, 1971, 85 Stat. 488; Act of December 27, 1975, 89 Stat. 1049; 43 U.S.C. § 422b)

EXPLANATORY NOTES

1975 Amendment. Subsections (a) and (b) of section 1 of the Act of December 27, 1975 (Public Law 94–181, 89 Stat. 1049) amended section 2 by: substituting, in subsection (d), the provision limiting the estimated cost of the project described in clauses (i), (ii), (iii), (iv), and (v) to the maximum allowable estimated total project cost as determined pursuant to subsection (f) for the former provisions limiting the estimated cost of such projects to $15,000,000; adding to subsection (d) the proviso relating to a project described in clauses (i), (ii), and (iii); and adding subsection (f). The 1975 Act appears in Volume IV in chronological order.

1971 Amendment. Section 1(1) of the Act of November 24, 1971 (Public Law 92–167, 85 Stat. 488) amended subsection (d) by increasing the project cost limit from $10,000,000 to $15,000,000 and redefining the type of project which is eligible for approval under the Act. Under the statute as amended, a project need not be primarily for irrigation, but may be single purpose irrigation, single purpose drainage, multiple-purpose, a distinct unit of the foregoing, or rehabilitation of any of the foregoing. The 1971 Act appears in Volume IV in chronological order.

Supplementary Provision: Applicability of Emergency Fund Act. The Act of October 1, 1982 (Public Law 97–275, 96 Stat. 1185) amended the Emergency Fund Act of 1948 to make that Act applicable to all projects and project facilities governed by Reclamation law, including projects and facilities serving municipal and industrial purposes and projects and facilities constructed with funds provided under the Small Reclamation Projects Act and the Distribution System Loans Act. The 1982 Act appears in Volume IV in chronological order.

NOTES OF OPINIONS

2. Projects, eligibility of

Diversion of most water flow for irrigation from an existing chute, which presently requires major rehabilitation, through the penstock of the proposed Garland Canal Power Project, is a sufficient irrigation purpose to qualify the project as a multiple-purpose water resource project as required by the act. Memorandum of Associate Solicitor Leshy to Assistant Secretary, Land and Water Resources, May 14, 1980.

Funding authorized under the Reclamation Safety of Dams Act is not available for rehabilitation of dams constructed under the Small Reclamation Projects Act as both the language of the Safety of Dams Act and the House Report clearly indicate that such funding is authorized only for dams actually constructed by the Water and Power Resources Service. Facilities constructed under the Small Reclamation Projects Act may, however, obtain loans for project improvement or repair under either the Small Reclamation Projects Act or the Rehabilitation and Betterment Act. Memorandum of Associate Solicitor Leshy to Commissioner, Water and Power Resources Service, April 29, 1980.

It appears from the legislative history of the Small Reclamation Projects Act that the term "distinct unit" means something more than an individual feature of an undertaking but something less than a self-contained undertaking entirely independent from all other sources of water supply or pumping power. Even though the Act does not define "distinct unit," it is clear from the Act and its history that the law prohibits a second loan if, when combined with an earlier loan, it is used to fund an undertaking exceeding the cost limitations contained in the Act, or if a larger undertaking is broken down into an artificial unit simply to qualify for a loan. While consideration should be given to such factors as whether a distinct legal entity was formed to apply for the loan, whether the purpose of the proposed loan is different from that of earlier loans, or whether there is physical, economic, or chronological separation of the former undertaking from the proposed undertaking, no single factor is determinative. Rather, each application must be measured on a case-by-case basis against all the criteria to determine whether, on balance, it meets the Act's requirements of being a project, a distinct unit of a project, or a rehabilitation and betterment of a project or distinct unit. Memorandum of Associate Solicitor Leshy to Commissioner of Reclamation, October 18, 1979, in re small reclamation project proposed by the Eastern Municipal Water District.

The language in section 4(e) of the Small Reclamation Projects Act of 1956 requiring the Secretary to consider "whether the proposed project is primarily for irrigation" clearly evidences that Congress did not intend the term "project", as defined by section 2(e) (prior to the 1971 amendment), to be restricted only to complete undertakings used exclusively for irrigation purposes. If such an undertaking is to be "primarily" for irrigation, then it is acceptable to have the undertaking also serve a secondary compatible purpose. Thus the Act does not prevent the Board of Land and Natural Resources of Hawaii from entering into a contract providing for the rental and use by the Kaiuakoi Corporation of water facilities and space within the pipelines of the Molokai Irrigation System to convey the corporation's well water to its proposed resort complex, even though the irrigation system is financed, in part, under the Act. *Molokai Homesteaders Cooperative Association v. Morton*, 506 F.2d 572 (9th Cir. 1974).

The Buttonwillow and Pond-Poso water districts may qualify for separate loans under the Act where the purpose of the loans is to construct a main canal to be used jointly by them (in conjunction with separate laterals), so long as the districts are separate entities both legally and because of different hydrologic and geographic make-up, and each district qualifies separately for a loan to construct its facility as a complete irrigation undertaking. Where, however, two districts are arbitrarily formed out of a single unit for purposes of evading the loan limitations, a different result might occur. Solicitor Melich Opinion, February 3, 1971, in re loan application of Pond-Poso Improvement District.

The definition of the term "project" in the Act is sufficiently broad to include all features of an irrigation development, including drainage, where required to make the irrigation features economically successful. Memorandum of Associate Solicitor Morthland to Commissioner of Reclamation, May 19, 1970, in re Federal financing for construction of drainage collector works.

A local irrigation district which has constructed a distribution system financed independently of any federally financed project under Reclamation law, but which receives project water under contract from Federal Reclamation water supply works, is eligible for Federal financing of drainage systems where such systems are required to complete or make viable heretofore non-federally financed developments. Memorandum of Associate Solicitor Morthland to Commissioner of Reclamation, May 19, 1970, in re Federal financing for construction of drainage collector works.

While small reclamation project loan funds may not be used for farm development where land is privately owned and private landowners would benefit from the expenditure, such funds are available for development work, including levelling and rehabilitation of farm turnouts and ditches, on land within the Colorado River Indian Tribes Small Reclamation Project, as title to such land is held by the United States in trust for the Indians. Letter of Deputy Solicitor Allan to Frederic L. Kirgis, Esq., June 4, 1968.

Small Reclamation Projects Act loan funds may be used to reimburse the Lakeside Irrigation Water District for that portion of the acquisition costs of stock in the Lakeside Ditch Company which represent the present worth of structures and facilities owned by the Ditch Company, which the District intends to rehabilitate and better. Although the Act does not authorize loans to be used solely for the purchase of already existing facilities, the use of loan funds to reimburse acquisition costs of structures and facilities is authorized where the loan primarily is intended to finance a program of new construction and rehabilitation and betterment, and the acquisition of existing facilities is merely a minor and incidental feature of this program. Memorandum of Associate Solicitor Miron to Commissioner of Reclamation, May 24, 1968.

Where the complete irrigation undertaking consists of laterals to serve the water district and a four-mile portion of a sixteen-mile main canal, which also would serve the Pond-Poso Improvement District and the Buena Vista Water Storage District, the cost of the main canal may not be excluded in determining whether the project is within the $10 million limit merely because the main canal is to be constructed by the Kern County Water Agency, a separate entity. Solicitor Barry Opinion, M-36698, March 29, 1968, in re application of Semitropic Water Storage District on behalf of the Buttonwillow Improvement District.

The Buttonwillow Improvement District's share of the cost of a main canal to be constructed by the Kern County Water Agency to supply water to three districts should be included in the cost of the District's diversion and distribution facilities in determining whether the total cost of the "project" exceeds the $10,000,000 limit. Solicitor Barry Opinion, M-36698, March 29, 1968.

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Sec. 3. [Proposals.]—

* * * * *

NOTE OF OPINION

1. Supplemental application

Where a small reclamation project loan application has previously been filed and the statutory $1,000 filing fee paid, the Commissioner of Reclamation has administrative authority to waive an additional filing fee where the amount of the application is to be increased to cover the construction of facilities as originally proposed, but whose cost has been increased by rising construction costs. Review of the supplemental application would be limited to determining that the increased costs would not adversely affect the financial feasibility of the project. Such limited review, which would also have been undertaken previously by the State, would not require the detailed examination of the proposal as contemplated by section 3 of the Small Reclamation Projects Act. Memorandum of Associate Solicitor Morthland to Commissioner of Reclamation, January 14, 1970, re filing fee for the Central Oregon Irrigation District's proposed amendment to its approved Small Reclamation Projects Act loan application.

Page 1333

Sec. 4.(b) [Organization submitting proposal shall hold lands necessary for the project or show that it can acquire such lands.]—

* * * * *

NOTE OF OPINION

1. Cost of land acquisition

The cost of the acquisition of land associated with flood control benefits may be included in the grant portion of the small reclamation project proposal as a nonreimbursable function under section 5(b) (5) notwithstanding the provision in section 4(b) that the applicant must be willing to finance otherwise than by loan or grant the cost of acquiring lands or interests in lands. Memorandum of Acting Associate Solicitor Davis to Commissioner of Reclamation, January 20, 1971, in re application by Yolo County Water Users.

Page 1335

Sec. 4.(d) [Secretary authorized to increase loan and/or grant amount.]—At the time of his submitting the project proposal to the Congress, or at any subsequent time prior to completion of construction of the project, including projects heretofore approved, the Secretary may increase the amount of the requested loan and/or grant to an amount within the maximum allowed by subsection (a) of section 5 as amended, to compensate for increases in construction costs due to price escalation. (Added by Act of December 27, 1975, 89 Stat. 1049; 43 U.S.C. § 422d)

EXPLANATORY NOTE

1975 Amendment. Section 1(c) of the Act of December 27, 1975 (Public Law 94–181, 89 Stat. 1049) amended section 4 by adding new subsection (d) and redesignating former subsections (d) and (e) as "(e)" and "(f)", respectively. The 1975 Act appears in Volume IV in chronological order.

NOTE OF OPINION

1. Amendatory or supplemental contract required

Basic contract law, section 5 of the Act, and sound business practice require that an amendatory or supplemental contract be entered into in order to increase the amount of a loan pursuant to the loan escalation provisions of section 4(d). Memorandum from Assistant Solicitor Mauro to Regional Solicitor, Sacramento, December 4, 1979.

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Sec. 4.(e) [Waiting period for project appropriations.]—

* * * * *

EXPLANATORY NOTE

1975 Amendment. Section 1(d) of the Act of December 27, 1975 (Public Law 94–181, 89 Stat. 1050) amended subsection (d) by redesignating it subsection "(e)". The 1975 Act appears in Volume IV in chronological order.

Pages 1335-1336

Sec. 4.(f) [Consideration of need, etc.]—The Secretary shall give due consideration to financial feasibility, emergency, or urgent need for the project. All project works and facilities constructed under this Act shall remain under the jurisdiction and control of the local contracting organization subject to the terms of the repayment contract. (70 Stat. 1044; Act of June 5, 1957, 71 Stat. 48; Act of November 24, 1971, 85 Stat. 488; Act of December 27, 1975, 89 Stat. 1050; 43 U.S.C. § 422d)

EXPLANATORY NOTES

1975 Amendment. Section 1(e) of the Act of December 27, 1975 (Public Law 94–181, 89 Stat. 1050) amended subsection (e) by redesignating it subsection "(f)". The 1975 Act appears in Volume IV in chronological order.

1971 Amendment. Section 1(2) of the Act of November 24, 1971 (Public Law 92–167, 85 Stat. 488) amended the first sentence of subsection (f) (formerly subsection (e)) by deleting ", whether the proposal involves furnishing supplemental irrigation water for an existing irrigation project, whether the proposal involves rehabilitation of existing irrigation project works, and whether the proposed project is primarily for irrigation", which appeared after the word "project". The 1971 Act appears in Volume IV in chronological order.

NOTE OF OPINION

1. Projects, eligibility of

The language in section 4(e) of the Small Reclamation Projects Act of 1956 requiring the Secretary to consider "whether the proposed project is primarily for irrigation" clearly evidences that Congress did not intend the term "project", as defined by section 2(e) (prior to the 1971 amendment), to be restricted only to complete undertakings used exclusively for irrigation purposes. If such an undertaking is to be "primarily" for irrigation then it is acceptable to have the undertaking also serve a secondary compatible purpose. Thus the Act does not prevent the Board of Land and Natural Resources of Hawaii from entering into a contract providing for the rental and use by the Kaiuakoi Corporation of water facilities and space within the pipelines of the Molokai Irrigation System to convey the corporation's well water to its proposed resort complex, even though the irrigation system is financed, in part, under the Act. *Molokai Homesteaders Cooperative Association v. Morton*, 506 F.2d 572 (9th Cir. 1974).

August 6, 1956

SMALL RECLAMATION PROJECTS ACT—SEC. 5 *1336-1338*

Pages 1336-1338

Sec. 5. [Contract requirements.]—Upon approval of any project proposal by the Secretary under the provisions of section 4 of this Act, he may negotiate a contract which shall set out, among other things—

(a) the maximum amount of any loan to be made to the organization and the time and method of making the same available to the organization. Said loan shall not exceed the lesser of (1) two-thirds of the maximum allowable estimated total project cost as determined by section 2(f) of this Act, or (2) the estimated total cost of the project minus the contribution of the local organization as provided in section 4(b) of this Act and the amount of the grant approved;

(b) the maximum amount of any grant to be accorded the organization. Said grant shall not exceed the sum of the following: (1) the costs of investigations, surveys, and engineering and other services necessary to the preparation of proposals and plans for the project allocable to fish and wildlife enhancement or public recreation; (2) one-half the costs of acquiring lands or interests therein to serve exclusively the purposes of fish and wildlife enhancement or public recreation, plus the costs of acquiring joint use lands and interests therein properly allocable to fish and wildlife enhancement and public recreation; (3) one-half the costs of basic public outdoor recreation facilities or facilities serving fish and wildlife enhancement purposes exclusively; (4) one-half the costs of construction of joint use facilities properly allocable to fish and wildlife enhancement or public recreation; and (5) that portion of the estimated cost of constructing the project which, if it were constructed as a Federal reclamation project, would be properly allocable to functions, other than recreation and fish and wildlife enhancement, which are nonreimbursable under general provisions of law applicable to such projects: *Provided,* That the cost of constructing the project as used in this subsection shall be exclusive of the cost of lands and interests in land;

(c) a plan of repayment by the organization of (1) the sums lent to it in not more than fifty years from the date when the principal benefits of the project first become available; (2) interest, as determined by the Secretary of the Treasury, as of the beginning of the fiscal year in which the contract is executed, on the basis of the computed average interest rate payable by the Treasury upon its outstanding marketable public obligations, which are neither due nor callable for redemption for fifteen years from date of issue, and by adjusting such average rate to the nearest one-eighth of 1 per centum, on that portion of the loan which is attributable to furnishing irrigation benefits in each particular year to land held in private ownership by a qualified recipient, as such term is defined in section 202 of the Reclamation Reform Act of 1982, in excess of nine hundred and sixty irrigable acres, or by a limited recipient, as such term is defined in section 202 of the Reclamation Reform Act of 1982, in excess of three hundred and twenty irrigable acres; and (3) in the case of any project involving an allocation to domestic, industrial, or municipal water supply, commercial power, fish and wildlife enhancement, or public recreation, interest on the unamortized

best copy available

balance of an appropriate portion of the loan at a rate as determined in (2) above; Except [sic] that portion of said allocation attributable to furnishing benefits to a facility operated by an agency of the United States, which portion shall bear no interest;

* * * * *

(70 Stat. 1046; Act of June 5, 1957, 71 Stat. 49; Act of September 2, 1966, 80 Stat. 376; Act of November 24, 1971, 85 Stat. 488; Act of December 25, 1975, 89 Stat. 1050; Act of September 4, 1980, 94 Stat. 1065; Act of October 12, 1982, 96 Stat. 1272; 43 U.S.C. § 422e)

EXPLANATORY NOTES

1982 Amendment. Section 223 of the Reclamation Reform Act of 1982 (Act of October 12, 1982, Public Law 97-293, 96 Stat. 1272) amended paragraph (c)(2) by substituting "by a qualified recipient, as such term is defined in section 202 of the Reclamation Reform Act of 1982, in excess of nine hundred and sixty irrigable acres, or by a limited recipient, as such term is defined in section 202 of the Reclamation Reform Act of 1982, in excess of three hundred and twenty irrigable acres" for "by any one owner in excess of one hundred and sixty irrigable acres". The 1982 Act appears in Volume IV in chronological order.

1980 Amendment. Section 8(b) of the Act of September 4, 1980 (Public Law 96-336, 94 Stat. 1065) amended paragraph (c)(3) by inserting the final clause thereof referring to allocations attributable to furnishing benefits to a facility operated by an agency of the United States. The 1980 Act appears in Volume IV in chronological order.

1975 Amendment. Section 1(f) of the Act of December 27, 1975 (Public Law 94-181, 89 Stat. 1050) amended paragraph (a)(1) by substituting "two-thirds of the maximum allowable estimated total project cost as determined by section 2(f) of this Act" for "$10,000,000". The 1975 Act appears in Volume IV in chronological order.

1971 Amendment. The Act of November 24, 1971 (Public Law 92-167, 85 Stat. 488) amended paragraphs (a), (b), and (c) in the following manner: section 1 (3) amended paragraph (a) by substituting "$10,000,000" for "$6,500,000"; section 1(4) amended paragraph (b)(2) by providing that a grant may be made for one-half of the cost of acquiring lands specifically for fish and wildlife enhancement and recreation and for the entire cost of joint-use lands allocated to these purposes; section 1(5) amended paragraph (b)(5) by adding the proviso as it appears in the text; and section 1(6) amended paragraph (c)(3) to require that all reimbursable fish and wildlife and recreation costs be repaid with interest at the rate determined by the formula set forth in paragraph (b)(2). The 1971 Act appears in Volume IV in chronological order.

NOTES OF OPINIONS

Deferral of repayment 3
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1. Excess lands

The ownership limitations of Reclamation law, as enunciated in Solicitor's Opinion M-36919 (December 6, 1979), holding that residency remains a requirement of Reclamation law and the acreage limitation provisions apply on a Reclamation-wide basis, do not apply to lands receiving water from facilities constructed pursuant to the Small Reclamation Projects Act. While the Small Reclamation Projects Act is a supplement to Reclamation law, it has been held, in Solicitor's Opinion M-36904, 85 I.D. 254 (1978), that the residency requirement was not incorporated into the Act. Similarly, and for the same reasons given in that Opinion, the Reclamation-wide ownership limitation of Reclamation law also was not incorporated into the Act. Memorandum of Assistant Solicitor Mauro to Regional Solicitor, Pacific Southwest, April 24, 1981, in re application of Solicitor Opinion M-36919 to Small Reclamation Projects Act projects.

Section 5(c) of the Small Reclamation Projects Act of 1956, which requires repayment with interest of that portion of the project loan which is attributable to furnishing irrigation benefits to excess lands, exempts these projects from the requirement of Reclamation law that landowners agree to dispose of their excess lands in order to receive project water for such holdings. Congress did not intend, by the enactment of section 11 of the 1956 Act making the latter a supplement to the Reclamation laws, to incorporate the general Reclamation laws into the 1956 Act. Accordingly, there is no requirement that the landowner be an actual bona fide resident on the land as a condition for the delivery of water from a small reclamation project. Solicitor Krulitz Opinion, 85 I.D. 254 (July 17, 1978) in re application of the acreage limitation and residency requirements to Small Reclamation Projects Act projects.

Where land is held in trust for 15 separate ownership interests, but each beneficiary's right to possession is subject to the approval of owners of not less than 66⅔% of the beneficial interest in the trust property, the trust does not qualify as an appropriate device for the holding of excess land. The beneficial interest is not an "ownership" interest within the meaning of either section 46 of the Omnibus Adjustment Act of the provisions of Small Reclamation Projects Act. Memorandum of Acting Associate Solicitor Davis to Regional Solicitor, Los Angeles, April 22, 1970, in re Wolfskill Trust; affirmed, Letter of Associate Solicitor Morthland to William M. Fischback, May 11, 1971.

Computation of interest on the portion of a Small Reclamation Projects Act loan for the improvement and rehabilitation of the district's existing irrigation project which is attributable to irrigation of excess lands should begin when the project irrigation service becomes available to the landholder, even though not specifically provided by the contract with the irrigation district. Dec. Comp. Gen. B-163663, May 24, 1968, in re validity of a claim against the Roosevelt Irrigation District.

It is permissible under the Small Reclamation Projects Act to determine interest each year on the basis of the actual application of water to non-excess lands where the contract permits the landowner to redesignate each year the non-excess lands receiving water. Memorandum of Associate Solicitor Hogan, April 18, 1967, in re proposed loan contract with North Poudre Irrigation Company.

3. Deferral of repayment

The language of section 3 of the Act of September 21, 1959, which provides that any project "within the administrative jurisdiction" of the Secretary of the Interior will be governed by its provisions, makes the Act applicable to all projects for which the Secretary is the contracting officer, even though certain projects so included are not constructed as Reclamation projects. Thus, as section 5 of the Small Reclamation Projects Act authorizes the Secretary to administer the repayment contracts for projects constructed with loans authorized thereunder, the Secretary has authority, pursuant to the 1959 Act, to grant deferments to the Georgetown Divide Water District, California, a project financed under the Small Reclamation Projects Act. Memorandum of Associate Solicitor Miron to Commissioner of Reclamation, January 22, 1969.

4. Escalation of loan amount

Basic contract law, section 5 of the Act, and sound business practice require that an amendatory or supplemental contract be entered into in order to increase the amount of a loan pursuant to the loan escalation provisions of section 4(d). Memorandum from Assistant Solicitor Mauro to Regional Solicitor, Sacramento, December 4, 1979.

5. Grants

The cost of the acquisition of land associated with flood control benefits may be included in the grant portion of the small reclamation project proposal as a nonreimbursable function under section 5(b)(5) notwithstanding the provision in section 4(b) that the applicant must be willing to finance otherwise than by loan or grant the cost of acquiring lands or interests in lands. Memorandum of Acting Associate Solicitor Davis to Commissioner of Reclamation, January 20, 1971, in re application by Yolo County Water Users.

6. Labor standards

The Bureau of Reclamation is not required to include the labor standards established by either the Copeland Act or the Contract

Work Hours Standards Act in Reclamation repayment contracts executed pursuant to the Small Reclamation Projects Act and the Distribution System Loans Act, as the latter Acts make no provision for the application of wage and hour standards to the work financed by the grant or loan issued thereunder. Moreover, Copeland Act contract provisions requiring adherence to Department of Labor regulations are intended to aid in enforcement of the Davis-Bacon Act and other statutes dealing with federally-assisted construction that contain similar wage provisions and in the enforcement of overtime provisions of the Contract Work Hours Standards Act whenever they are applicable to construction work. In the absence of Davis-Bacon Act provisions or Contract Work Hour Standards provisions there is no requirement for inclusion of a contract provision relating to Copeland Act regulations. Memorandum for Acting Associate Solicitor Davis to Commissioner of Reclamation, July 18, 1968.

7. NEPA compliance

No environmental impact statement was required for the construction of the Molokai Irrigation system even though it was financed, in part, under the Small Reclamation Projects Act of 1956, as the repayment contract was executed in 1963 and the project completed in 1969, before enactment of the National Environmental Policy Act. The facts that Hawaii's repayment obligation continued after 1968 and that, as provided by section 5(d) of the 1956 Act, the Secretary of the Interior had a continuing right to interject himself into the affairs of the system in the event of noncompliance with the repayment contract, are insufficient to render the Secretary's decision not to participate in negotiations between the Board of Land and National Resources of Hawaii and the Kaiuakoi Corporation for rental of system facilities a "major Federal action." *Molokai Homesteaders Cooperative Association v. Morton,* 506 F.2d 572 (9th Cir. 1974).

8. Project operation

The language of section 5(d) of the Small Reclamation Projects Act of 1956 which specifies that the loan contracts made under the Act shall contain a provision for the operation of the project in accordance with prescribed Government regulations does not limit the use of Molokai Irrigation Project works to those specifically authorized in the contract. The legislative purpose behind the Act was to provide a separate and independent means to make Federal loans available for the construction of small, local water utilization projects which would be controlled and administered by State or local agencies, thereby avoiding the expense of Federal administration. Federal participation under the Act is limited to the role of a lending agency and the language which section 5(d) requires to be used in the loan contract is designed only to insure repayment of the Federal loan. Consequently, the Act does not preclude the Board of Land and Natural Resources of Hawaii from contracting to provide water facilities and space within project pipelines to the Kaiuakoi Corporation to convey its well water to its proposed resort complex even though such use is not specifically authorized in the section 5 contract. *Molokai Homesteades Cooperative Association v. Morton,* 356 F. Supp. 148 (D. Hawaii 1973), aff'd, 506 F.2d 572 (9th Cir. 1974).

9. Public access

There are no legal means available to require owners of privately-owned land around a reservoir built prior to 1966 pursuant to the Small Reclamation Projects Act of 1956 to provide public access to the reservoir. Memorandum of Associate Solicitor Morthland, December 16, 1969.

Because the Hernandez Dam was constructed before the 1966 amendment to the Act, and at the time the loan application was made no recreation purposes were contemplated and no provision made for public access to the reservoir, the Department of the Interior cannot require the grantees to provide recreational facilities or public access, as the 1966 amendment is not retroactive. Memorandum of Associate Solicitor Morthland to Field Solicitor, San Francisco, December 16, 1969.

10. Reimbursability of costs

Costs allocated to anadromous fishery enhancement should not be treated as nonreimbursable under section 5(b)(5) but should be treated no differently than other fish and wildlife enhancement costs, which are subject to the cost sharing provisions of the Act. Memorandum of Associate Solicitors Good and Spradley to Field Solicitor, Boise, December 13, 1982.

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Sec. 10. [Appropriation.]—There are hereby authorized to be appropriated, such sums as may be necessary, but not to exceed $600,000,000 to carry out the provisions of this Act: *Provided*, That the Secretary shall advise the Congress promptly on the receipt of each proposal referred to in section 3, and no contract shall become effective until appropriated funds are available to initiate the specific proposal covered by each contract. All such appropriations shall remain available until expended and shall, insofar as they are used to finance loans made under this Act, be reimbursable in the manner hereinabove provided. (70 Stat. 1047; Act of September 2, 1966, 80 Stat. 376; §1 (7), Act of November 24, 1971, 85 Stat. 488; Act of December 27, 1975, 89 Stat. 1050; Act of September 4, 1980, 94 Stat. 1065; 43 U.S.C. §422j)

EXPLANATORY NOTES

Amendments Increasing Appropriations Authorization. The Acts of November 24, 1971 (Public Law 92-167, 85 Stat. 488), December 27, 1975 (Public Law 94-181, 89 Stat. 1050), and September 4, 1980 (Public Law 96-336, 94 Stat. 1065) amended section 10 by increasing the amounts authorized to be appropriated to $300,000,000, $400,000,000, and $600,000,000, respectively. The 1971, 1975, and 1980 Acts appear in Volume IV in chronological order.

NOTE OF OPINION

1. Anti-Deficiency Act

Because Section 10 of the Small Reclamation Projects Act requires only that appropriated funds necessary to initiate the specific proposal covered by each contract be available in order to make the contract effective, the Act implicitly authorizes the Secretary to enter into repayment contracts which would obligate the United States in excess of appropriations. Consequently, the Anti-Deficiency Act, 31 U.S.C. § 665(a), does not prevent the Department of Interior from executing a repayment contract for a project funded under the Small Reclamation Projects Act with the De Luz Municipal Water District where the total contract obligation would be $5.4 million even though current appropriations totaled only $3.4 million. Memorandum of Associate Solicitor Leshy to Deputy Assistant Secretary, Land and Water Resources, September 7, 1977.

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Sec. 11. [Supplement to Reclamation laws—Short title.]—

* * * * *

NOTES OF OPINIONS

Relationship with other laws 1
Use of reclamation fund 2

1. Relationship with other laws

Because section 11 of the Small Reclamation Projects Act expressly provides that it "shall be a supplement to the Federal reclamation laws," section 12 of the Reclamation Project Act of 1939 applies to Small Reclamation Projects Act projects. Memorandum of Associate Solicitor Leshy to Deputy Assistant Secretary, Land and Water Resources, September 7, 1977, in re proposed contract with De Luz Heights Municipal Water District, California.

The requirement of the Act of February 25, 1920 that the Secretary be a party to all contracts to supply water from any project irrigation system for purposes other than irrigation does not apply to the Small Reclamation Projects Act of 1956, notwithstanding the language in section 11 of the latter Act that it shall be a supplement to the Federal Reclamation laws. Where, as here, a provision of one of the earlier enacted general Reclamation and irrigation laws conflicts with the clear intention of the 1956 Act to vest contracting authority in the local organizations which construct and operate the project, the later Act must prevail. Consequently, even though the Molokai Irrigation System has been financed, in part, under the Small Reclamation Projects Act, neither contractual approval by the Secretary of the Interior or any other Federal action is required by the 1920 Act for the Board of Land and Natural Resources of Hawaii to contract to provide water facilities and space within Molokai pipelines to the Kaiuakoi Corporation to carry its well water to its proposed resort complex. *Molokai Homesteaders Cooperative Association v. Morton*, 506 F.2d 572 (9th Cir. 1974).

2. Use of reclamation fund

Section 11 of the Small Reclamation Projects Act and the legislative history make it clear that the Act is a phase of the Reclamation program, is supplementary to Reclamation law, and that the reclamation fund is thus available for carrying out its purposes. Memorandum of Associate Solicitor Good to Commissioner, September 8, 1982.

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Sec. 13. [Deferral of repayment installments.]—A loan contract negotiated and executed pursuant to this Act may be amended or supplemented for the purpose of deferring repayment installments in accordance with the provisions of section 17(b) of the Reclamation Project Act of 1939, as amended (73 Stat. 584, 43 U.S.C. 485b–1). (Added by § 1(8), Act of November 24, 1971, 85 Stat. 488; 43 U.S.C. § 422k-1)

EXPLANATORY NOTE

1971 Amendment. Section 13 was added by section 1(8) of the Act of November 24, 1971 (Public Law 92–167, 85 Stat. 488). The 1971 Act appears in Volume IV in chronological order.

CROOKED RIVER PROJECT

Pages 1340-1342

EXPLANATORY NOTE

Codification Omitted. The Act of August 6, 1956 (70 Stat. 1058), authorizing the Crooked River Project, originally was codified at 43 U.S.C. §§ 615f-615j but was omitted from the 1976 and subsequent editions of the U.S. Code as having limited applicability.

LITTLE WOOD RIVER PROJECT

Pages 1343-1344

EXPLANATORY NOTE

Codification Omitted. The Act of August 6, 1956 (70 Stat. 1059), authorizing the Little Wood River Project, originally was codified at 43 U.S.C. §§ 615k-615n but was omitted from the 1976 and subsequent editions of the U.S. Code as having limited applicability.

SAN ANGELO PROJECT

Pages 1354-1356

EXPLANATORY NOTE

Codification Omitted. The Act of August 16, 1957 (71 Stat. 372), authorizing the San Angelo Project, originally was codified at 43 U.S. C. §§ 615o-615r but was omitted from the 1976 and subsequent editions of the U.S. Code as having limited applicability.

Pages 1354-1355

Sec. 2.(b) [Contract.], (c) [Water rates—Interest—Storage space.], (d) [Repayment contract prerequisites.]—

* * * * *

EXPLANATORY NOTE

Supplementary Provision: Revision of Repayment Contract. The Act of October 29, 1971 (Public Law 92-147, 85 Stat. 415) authorized the Secretary to revise the repayment contract with the San Angelo Water Supply Corporation by extending the period authorized for repayment of reimbursable construction costs of the San Angelo Project from forty to fifty years. The 1971 Act appears in Volume IV in chronological order.

BEAR RIVER COMPACT

Pages 1398-1410

EXPLANATORY NOTE

1980 Amendment. The Act of February 8, 1980 (Public Law 96–189, 94 Stat. 4) granted Congressional consent to an amended Bear River Compact. The 1980 Act and amended Compact appear in Volume IV in chronological order.

REIMBURSE LANDOWNERS FOR MOVING EXPENSES

Pages 1418-1419

An act to authorize the Secretary of the Interior to reimburse owners of lands acquired for developments under his jurisdiction for their moving expenses, and for other purposes. (Act of May 29, 1958, Public Law 85–433, 72 Stat. 152)—*Repealed.*

EXPLANATORY NOTE

1971 Repeal. This Act was repealed in full by section 220(a)(1) of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Act of January 2, 1971, Public Law 91–646, 84 Stat. 1903). Extracts from the 1971 Act, including section 220(a)(1), appear in Volume IV in chronological order.

NOTE OF OPINION

1. Relationship with other laws

Reimbursement to landowners for the relocation expenses they incur as a result of the acquisition of a right-of-way over their land to relocate California State Highway No. 49 is governed by the Moving Expense Act of May 29, 1958 and not by Chapter 5 of the Federal Aid Highway legislation, even assuming State Highway No. 49 was constructed with Federal Aid funds. The highway relocation is an integral part of the construction of the Central Valley Project's Auburn-Folsom South Unit and is therefore performed under authority of section 14 of the Reclamation Project Act of 1939. Memorandum of Associate Solicitor Morthland to Commissioner of Reclamation, March 20, 1970.

WATER SUPPLY ACT OF 1958

Pages 1426-1428

EXPLANATORY NOTE

Supplementary Provision: Water Conservation Plan. Section 210(b) of the Reclamation Reform Act of 1982 (Title II, Act of October 12, 1982, Public Law 97-293, 96 Stat. 1261, 1268) provides that every entity that has entered into a repayment contract or water service contract under the Water Supply Act of 1958 shall develop a water conservation plan. The 1982 Act appears in Volume IV in chronological order.

NOTES OF OPINIONS

Allocation of costs 2
Effect on authorized project purposes 3
Future capacity 1
Industrial water supply 4
Storage for recreational purposes 5
Water rates 6

1. Future capacity

Where, under the authority of the Water Supply Act of 1958, construction of a reservoir includes storage capacity to impound water for anticipated future municipal and industrial demands and there is more than one phase allocated to future water supply, phased repayment of the future demands is authorized by section 301(b). Thus, a reservoir could provide storage capacity for the future requirements of different entities or of future stages of development of one entity and in both cases the 50-year repayment requirement would begin to run from the date of first use for each separate phase. Memorandum from Acting Deputy Solicitor Ferguson to Assistant Secretary, Land and Water Resources, February 25, 1977, affirming memorandum of Associate Solicitor Hogan of March 29, 1965.

2. Allocation of costs

The phrase "construction costs, including interest during construction, allocated to water supply," for the purposes of calculating deferred payments of principal and for waivers of interest, refers only to costs allocated to water supply storage, and does not include the costs of water conveyance facilities. The costs of water conveyance facilities may, however, be included in the total cost of the project to which the 30 percent maximum allocated to anticipated future demands applies. Memorandum of Acting Assistant Commissioner Killin, September 28, 1967.

3. Effect on authorized project purposes

The Water Supply Act of 1958 does not independently authorize the sale of Stampede Reservoir water for municipal and industrial purposes as such use is not a specific purpose of the multi-purpose Washoe project and the Act specifically provides that where the modification of a reservoir project to include storage would seriously affect the authorized purposes of the project, further Congressional approval is required. Memorandum of Solicitor Martz to Regional Solicitor, Pacific Southwest, January 19, 1981.

4. Industrial water supply

By authorizing the Secretary of Interior to enter into contracts to supply project water for "municipal water supply or miscellaneous purposes," section 9(c) of the Reclamation Project Act of 1939 permits the sale of water for industrial purposes from the Yellowtail and Boysen Reservoirs of the Missouri River Basin. It is clear that section 1(b) of the Flood Control Act of 1944 approved the disposition of project water for industrial purposes. It is also evident that the phrase "municipal water supply or miscellaneous purposes" was intended to encompass industrial purposes, as: 1) the Act of June 21, 1963 expressly authorizes the renewal of contracts previously made under the 1939 Act for "municipal, domestic or industrial" purposes; 2) both section 2(b) of the Act of February 25, 1956 and section 301 of the Water Supply Act of 1958 illustrate that Congress has long associated municipal use with industrial use; and 3) Congress has been made aware of the Secretary's actions in selling project water for industrial use under the authority of the 1939 Act and has not objected. *Environmental Defense Fund, Inc. v. Morton*, 420 F. Supp. 1037 (D. Mont.

1976), aff'd sub nom. *Environmental Defense Fund, Inc. v. Andrus*, 596 F.2d 848 (9th Cir. 1979).

In contracting to supply water for industrial purposes from the Yellowtail and Boysen Reservoirs of the Missouri River Basin the Secretary was not obligated to comply with the Water Supply Act. Such sale is independently authorized by section 9(c) of the Reclamation Project Act of 1939 and the Water Supply Act expressly declares that it "shall be alternative to and not a substitute for the provisions of the [1939 Act]." *Environmental Defense Fund, Inc. v. Morton*, 420 F. Supp. 1037 (D. Mont. 1976), aff'd sub nom. *Environmental Defense Fund, Inc. v. Andrus*, 596 F.2d 848 (9th Cir. 1979).

5. Storage for recreational purposes

Nothing in section 301(b) of the Water Supply Act of 1958 suggests that a municipality such as the City of Albuquerque may place, solely for recreational purposes, the excess water it receives from the Heron Reservoir, San Juan-Chama Project, into storage in the Elephant Butte Reservoir. Even if the statute is read to permit storage by a municipality for any purpose, the specific terms and conditions of the Colorado River Storage Project Act and the Act of June 13, 1962, which make recreational use only incidental to the primary purposes of municipal, industrial and irrigation uses, override conflicting authority in section 301(b). *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126 (10th Cir. 1981).

6. Water rates

Rates for the sale of regulatory water supply from Ruedi Reservoir may be established pursuant to section 301(b) of the Water Supply Act of 1958 as at the time construction was authorized Congress was notified that repayment of municipal and industrial costs would be governed by the Water Supply Act, interest on water supply had already been deferred for ten years, and the language of the Water Supply Act specifies that its provisions are available as an alternative to those of the 1939 Act. Memorandum of Assistant Solicitor Mauro to Regional Solicitor, Rocky Mountain Region, March 20, 1981, in re proposed sale of water, Fryingpan-Arkansas Project.

EXTENSION OF CARIBOU AND TARGHEE NATIONAL FORESTS

Pages 1442-1443

Sec. 4. (a) [Applicability to laws and regulations.]—It is hereby declared that the sole purpose of this Act is to subject the lands referred to in the foregoing sections of this Act to all laws and regulations applicable to national forests, and nothing in this Act shall be construed to authorize the United States to acquire any additional lands or any interest therein, nor to diminish or in anywise affect any valid rights in or to, or in connection with, any such lands which may be in existence on the date of enactment of this Act, nor to prejudice the sale or lease by the Secretary of the Interior under the Act of June 1, 1938 (52 Stat. 609), as amended, of lands for which applications under that Act were pending on March 28, 1957, and of one additional tract, not exceeding five acres, in either the south half of the northwest quarter of the northeast quarter of the northwest quarter, or the north half of the northeast quarter of the northwest quarter of the northwest quarter, both of section 17, township 2 south, range 46 east, Boise meridian, if application for such additional tract be made not later than July 1, 1960, by an applicant whose application under R.S. 2455, as amended (43 U.S.C. 1171) for lands within the west half of the said section 17 was pending on March 28, 1957.

* * * * *

(72 Stat. 608; Act of August 18, 1959, 73 Stat. 365)

EXPLANATORY NOTE

1959 Amendment. Section 1 of the Act of August 18, 1959 (Public Law 86–165, 73 Stat. 365) amended subsection (a) of section 4 by adding the language which appears above at the end thereof following "date of enactment of this Act". Section 2 of the 1959 Act made this amendment effective as of the effective date of the 1958 Act. Section 3 of the 1959 Act provided that the intent of Congress in enacting that Act is that the applications identified in the amendment shall be granted or rejected, in whole or in part, on the basis of the same standards which would have been applied in granting or rejecting them had the 1958 Act not been enacted. The 1959 Act does not appear herein.

BRIDGES ON FEDERAL DAMS

Pages 1448-1450

§ 320. Bridges on Federal dams

* * * * *

(d) [Emergency fund.]—Not to exceed $65,000,000 of any money heretofore or hereafter appropriated for expenditure in accordance with the provisions of this title or prior Acts shall be available for expenditure by the Secretary in accordance with the provisions of this section, as an emergency fund, to reimburse any agency for any additional costs or expenditures which it may be required to incur because of the design and construction of any such dam so that it will constitute and serve as a foundation for a public highway bridge upon and across such dam and to reimburse any such agency for any costs, expenses, or expenditures which it may be required to make in designing and constructing any such bridge upon and across a dam in accordance with the provisions of this section, except such costs, expenses, or expenditures as would have been required of such agency in any event to satisfy a legal obligation to relocate a highway or bridge or to meet operating or other agency needs, and there is authorized to be appropriated any sum or sums necessary to reimburse the funds so expended by the Secretary from time to time under the authority of this section. Of each bridge constructed upon and across a dam under the provisions of this section, there may be financed wholly with Federal funds that portion thereof which is located within the physical limits of the masonry structure, or structures, of the dam, and the Secretary shall in his sole discretion determine what additional portion of the bridge, if any, may be so financed, such determination to be final and conclusive. The remainder of the bridge, and any necessary related approach roads, shall be financed by the State or its appropriate subdivision with or without the aid of Federal funds; but said portion of the bridge so financed by the State or its subdivisions, including such portion thereof, if any, as may extend beyond the physical limits of the dam, shall nevertheless be designed and constructed solely by the agency having custody and jurisdiction of the dam as provided in subsection (a) of this section.

* * * * *

(72 Stat. 917; Act of September 21, 1959, 73 Stat. 613; Act of August 13, 1964, 78 Stat. 398; Act of December 31, 1970, 84 Stat. 1724; Act of August 13, 1973, 87 Stat. 265; Act of January 4, 1975, 88 Stat. 2290; Act of May 5, 1976, 90 Stat. 443; Act of November 6, 1978, 92 Stat. 2707; 23 U.S.C. § 320)

BRIDGES ON FEDERAL DAMS

EXPLANATORY NOTE

Amendments Increasing Amount Available for Emergency Fund. Subsection (d) has been amended on five occasions since 1964 to increase the amount of money available for expenditure as an emergency fund. The most recent such amendment was effected by section 128(a) of the Act of November 6, 1978 (Public Law 95–599, 92 Stat. 2707), which increased the amount from $50,000,000 to $65,000,000. None of the amending Acts appears herein.

PUBLIC WORKS APPROPRIATION ACT, 1959

Page 1460

Sec. 205. [Restriction on transfer of funds by Southwestern Power Administration.]—

* * * * *

EXPLANATORY NOTE

Provision Repeated. The same provision is contained in each subsequent annual appropriation act through the Act of August 7, 1977 (91 Stat. 806). It was not continued in appropriations for the Southwestern Power Administration in the Department of Energy.

BOULDER CITY ACT OF 1958

Pages 1479-1481

Sec. 9.

* * * * *

(e) [Investigation.]—At the end of each period of five years after the date of incorporation of the municipality, the Secretary shall investigate the need for continuation of all or part of the assistance to the municipality provided under this section. (72 Stat. 1733; § 1(19), Act of January 2, 1975, 88 Stat. 1970)

EXPLANATORY NOTE

1975 Amendment. Section 1(19) of the Act of January 2, 1975 (Public Law 93–608, 88 Stat. 1967) amended section 9(e) by striking out the words "and shall report his findings and recommendations to the Congress as soon thereafter as practicable". Extracts from the 1975 Act, including section 1(19), appear in Volume IV in chronological order.

VOLUME III

RESEARCH FARM, WASHINGTON STATE

Page 1484

[Sale of project lands to State for agricultural research authorized.]—

* * * * *

Explanatory Note

Note Omitted from Text of Volume III: 1962 Amendment. Section 7 of the Act of October 1, 1962 (Public Law 87-728, 76 Stat. 679) provided that: "The Act of June 23, 1959 (73 Stat. 87) is hereby amended to . . . permit delivery of water to not to exceed six hundred and forty acres of irrigable lands whether or not said lands are in conformed farm units, owned by the State of Washington for use by the Washington State University for agricultural research purposes." The 1962 Act appears in Volume III at page 1690.

PUBLIC WORKS APPROPRIATION ACT, 1960

Page 1496

[Loans beyond fiscal year contingent upon appropriation.]—

* * * * *

EXPLANATORY NOTE

Provision Repeated. The same proviso is contained in each subsequent annual appropriation act through the most recent one reviewed for this publication, the Energy and Water Development Appropriation Act, 1982 (95 Stat. 1139), which was continued for fiscal year 1983 by section 101(f) of the Further Continuing Appropriations Act for Fiscal Year 1983 (96 Stat. 1906).

EXTRA CAPACITY, CROOKED RIVER PROJECT

Page 1500

EXPLANATORY NOTES

Codification Omitted. The two sections of the Act of September 14, 1959 (Public Law 86-271, 73 Stat. 554), authorizing extra capacity in the canal of the Crooked River Project, originally were codified at 43 U.S.C. §§ 615f and 615j note, respectively, but were omitted from the 1976 and subsequent editions of the U.S. Code as having limited applicability.

Note Omitted from Text of Volume III: Cross Reference, Crooked River Extension. The Act of September 18, 1964 (Public Law 88-598, 78 Stat. 954) authorized construction of the Crooked River project extension, authorized the appropriation of $1,132,000 for construction of the new works involved therein, and directed the Secretary to make available from the Federal Columbia River power system supplemental power and energy required for irrigation pumping for the project. The 1964 Act appears in Volume III at page 1802.

SPOKANE VALLEY PROJECT

Page 1501

EXPLANATORY NOTE

Codification Omitted. The Act of September 16, 1959 (Public Law 86-276, 73 Stat. 561), authorizing the Spokane Valley Project, originally was codified at 43 U.S.C. §§ 615s to 615u but was omitted from the 1976 and subsequent editions of the U.S. Code as having limited applicability.

SAN LUIS UNIT, CENTRAL VALLEY PROJECT

Pages 1524-1526

[Sec. 1. (a) San Luis Unit authorized—Restrictions on construction of Federal electric transmission or distribution facilities—Joint use facilities with State of California—Conditions precedent to construction—State responsibility.]—

* * * * *

EXPLANATORY NOTE

Cross Reference, San Luis Unit Study. The Act of June 15, 1977 (Public Law 95-46, 91 Stat. 225) directed the Secretary to establish a task force to review the management, organization, and operations of the San Luis Unit; directed the task force to submit a report on the Unit to Congress by January 1, 1978; prohibited the Secretary from approving any amendatory or other contracts modifying existing contracts prior to completion of the task force report; required a 90-day period of Congressional review prior to approval of any such contract; and authorized to be appropriated $31,050,000 for continuation of construction of distribution systems and drains on the Unit but prohibited expenditure of funds by the Secretary prior to his obtaining a pledge from the Westlands Water District indicating its intention to repay costs associated with construction. The 1977 Act appears in Volume IV in chronological order.

NOTES OF OPINIONS

Authority to obligate funds 5
Excess land laws 3
Federal service area 6
McCarran Act 7
Repayment—Generally 8
Contributed funds 14

3. Excess land laws

A group of small family farmers who do not receive water from the State Water Project and who do not allege particularized injury caused by the defendants' action and redressable by the requested relief, lack standing to challenge the non-application of the 160-acre limitation to the State service area of the San Luis project. *Bowker v. Morton*, 541 F. 2d 1347 (9th Cir. 1976).

5. Authority to obligate funds

Where the legislative history of the Act of June 15, 1977 (Public Law 95-46, 91 Stat. 225), authorizing appropriations in the amount of $31,050,000 for continuation of construction of distribution systems and drains, showed that Congress intended to limit the availability of funds so appropriated to fiscal year 1978 and the appropriation act for 1978 (Public Law 95-96, 91 Stat. 797, 801) provided a lump-sum for construction of authorized Reclamation projects "as authorized by law," the quoted phrase should be read to require that the $31,050,000 be obligated only in accord with the act authorizing the appropriation, i.e., such funds were to be used only in fiscal year 1978 even though the lump-sum Reclamation appropriation for 1978 is generally available until expended. Since these funds were available to be obligated for the San Luis Unit only in fiscal year 1978, subsequent fiscal year obligations were not properly incurred and any future obligation of those funds is unauthorized. Dec. Comp. Gen. B-198221 (July 19, 1982).

6. Federal service area

The administrative action enlarging and shifting the service area of the San Luis Unit from the 500,000 acres described in the project's 1956 feasibility report, which was referenced in the authorizing act, to approximately 614,000 acres in subsequent documents, is invalid. The fact that the enlarged area was described in a land classification report submitted to Congress pursuant to the Act of July 31, 1953 (67 Stat. 266), the repayment contract submitted to Congress in 1964 for its information under section 8 of the 1960 authorizing Act and budget justification documents, does not support Congressional ratification of the larger area. To revise by administrative action a relatively specific project authorization requires an equally specific approval by Congress. The October 30, 1962 opinion of the Regional Solicitor, Sacramento, holding that water service could be provided to the entire Westlands Water District as it then existed is overruled. Solicitor Krulitz Opinion, 85 I.D. 297 (July 31, 1978), in re Westlands Water District, Legal Questions.

7. McCarran Act

Where the court is asked not only to adjudicate the rights of all the parties and the United States as they relate to the water which the Government has acquired for the operation of the San Luis Unit, Central Valley Project, but also to delineate, with some particularity, the applicable laws and regulations by which the Bureau of Reclamation must administer the San Luis Unit and the waters acquired by the United States for that purpose, the joinder of the United States is authorized by the second clause of the first sentence of the McCarran Act, even though all claimants to water from a given stream are not defendants. *Barcellos & Wolfsen, Inc. v. Westlands Water District*, 491 F. Supp. 263 (E.D. Cal. 1980).

8. Repayment—Generally

Where the Westlands Water District's permanent contractual arrangements had not become effective, water service was supplied under temporary arrangements, and the form of repayment contract which the District had accepted did not cover all reimbursable costs to which it was subject, there was a technical non-compliance with the requirement that the District must be fully obligated to bear reimbursable costs in order to be eligible to receive water service. Considering the tangled, uncertain, and controversial history of the Unit, however, service to the District need not be interrupted so long as immediate steps were taken to secure adequate repayment. The District had pledged to repay the $31 million authorized by the Act of June 15, 1977 for continuation of construction of the San Luis Unit distribution systems and drains and was assumed to be willing to enter into a repayment contract within a reasonable time obligating it to repay all the costs which the United States is obligated to recover from the District. A 1965 memorandum from the Assistant Secretary of the Interior to the Secretary, recommending that as much as 367,000 additional acre feet of water be supplied to the District, did not bind the United States contractually to furnish this amount of water. The United States could only be bound by a contract, confirmed by a court of competent jurisdiction, pursuant to the Act of May 15, 1922. Solicitor Krulitz Opinion, 85 I.D. 297 (1978), in re Westlands Water District, Legal Questions.

14. Contributed funds

The Contributed Funds Act authorizes the Bureau of Reclamation to accept a contribution of $5,000,000 from the Westlands Water District to advance construction work on the distribution system and section 9(c) of the Reclamation Project Act of 1939 authorizes the bureau to offset the value of the District's contribution by entering into a short-term (approximately five years) interim water service contract under which the District would be charged lower than the long-term rates. However, if the District's contribution is to be offset by charging it lower water rates for the short-term, then the cost of the facilities constructed with the contribution should be included in the total repayable actual cost of the distribution system to the District so that the United States, through payments made on the distribution system contract, will recoup the foregone water service revenues. Memorandum of Acting Associate Solicitor Miron to Commissioner of Reclamation, April 16, 1968.

Pages 1529-1530

Sec. 5. [Drainage system for San Luis Unit may be used by other parties; contract terms.]—

*   *   *   *   *

NOTES OF OPINIONS

Drain enlargement 3
Excess lands 2

2. Excess lands

Contracts with those taking drainage service from the San Luis Drain must include standard acreage limitation contract language by reason of section 5 of the San Luis Unit authorizing Act. The latter authorized the Secretary of the Interior to permit use of the San Luis Unit drainage system by other parties under contracts the terms of which are as nearly similar as practicable to those required by the Federal Reclamation laws in the case of repayment and water service contracts. Memorandum of Associate Solicitor Little to Assistant Secretary, Land and Water Resources, November 25, 1980, in re decision on resolution of San Joaquin Valley Drainage Problem exchange contractors.

3. Drain enlargement

Congressional rejection of a proposed amendment to the predecessor bill to the San Luis Act, which would have incorporated specific and express authority for Federal construction of enlarged facilities, indicates that section 5 of the Act of 1960 does not authorize the United States to construct any larger drain than that required for the Federal San Luis service area. Memorandum of Associate Solicitor Hogan, March 7, 1967, to Regional Solicitor, Sacramento, in re legal issues with respect to the construction of drainage facilities for San Luis Unit, CVP.

Page 1531

Sec. 8. [Appropriations authorizations.]—

* * * * *

EXPLANATORY NOTE

Supplementary Provision: Continuation of Construction of Distribution Systems and Drains. Section 1 of the Act of June 15, 1977 (Public Law 95-46, 91 Stat. 225) authorized to be appropriated $31,050,000 for continuation of construction of distribution systems and drains on the San Luis Unit but prohibited expenditure of funds by the Secretary prior to obtaining a pledge from the Westlands Water District indicating its intention to repay costs associated with construction. The 1977 Act appears in Volume IV in chronological order.

NOTE OF OPINION

1. Authority to obligate funds

Where the legislative history of the Act of June 15, 1977 (Public Law 95-46, 91 Stat. 225) authorizing appropriations in the amount of $31,050,000 for continuation of construction of distribution systems and drains showed that Congress intended to limit the availability of funds so appropriated to fiscal year 1978 and the appropriation act for 1978 (Public Law 95-96, 91 Stat. 797, 801) provided a lump-sum for construction of authorized Reclamation projects "as authorized by law," the quoted phrase should be read to require that the $31,050,000 be obligated only in accord with the act authorizing the appropriation, i.e., such funds were to be used only in fiscal year 1978 even though the lump-sum Reclamation appropriation for 1978 is generally available until expended. Since these funds were available to be obligated for the San Luis Unit only in fiscal year 1978, subsequent fiscal year obligations were not properly incurred and any future obligation of those funds is unauthorized. Dec. Comp. Gen. B-198221 (July 19, 1982).

HISTORICAL AND ARCHEOLOGICAL DATA

Pages 1533-1534

[Sec. 1. Purpose of the Act.]—It is the purpose of this Act to further the policy set forth in the Act entitled "An Act to provide for the preservation of historic American sites, buildings, objects, and antiquities of national significance, and for other purposes", approved August 21, 1935 (16 U.S.C. 461-467), by specifically providing for the preservation of historical and archaeological data (including relics and specimens) which might otherwise be irreparably lost or destroyed as the result of (1) flooding, the building of access roads, the erection of workmen's communities, the relocation of railroads and highways, and other alterations of the terrain caused by the construction of a dam by any agency of the United States, or by any private person or corporation holding a license issued by any such agency or (2) any alteration of the terrain caused as a result of any Federal construction project or federally licensed activity or program. (74 Stat. 220; § 1(1), Act of May 24, 1974, 88 Stat. 174; 16 U.S.C. § 469)

EXPLANATORY NOTES

Popular Name. This Act is sometimes referred to as the Reservoir Salvage Act.

1974 Amendment. Section 1(1) of the Act of May 24, 1974 (Public Law 93-291, 88 Stat. 174) amended section 1 by inserting "(1)" after "result of" and by adding paragraph (2). The 1974 Act does not appear herein.

"Federally Licensed Activity". The report of the Senate Committee on Interior and Insular Affairs states that "It is the intent of the Committee to preserve the interpretation of 'licensed' activities to mean construction works carried out under specific Federal licenses pertaining to the works themselves. The term is not intended to include permits for the use of public lands where significant construction is not involved. Where non-Federal entities conduct construction work which is subject to this measure, such entities may elect to contract directly with educational institutions or other competent scientific organizations to perform the survey and recovery work mutually agreed upon by the Secretary and the Federal agency responsible for the license or assistance. The funds in such case need not be transferred to the Secretary." S. Rept. No. 163, 93d Cong., 1st Sess. 2 (1973).

Sec. 2. [Secretary of the Interior to be notified before any agency of the United States undertakes, or issues a license for, the construction of a dam—Contents of the notice—Exceptions.]—Before any agency of the United States shall undertake the construction of a dam, or issue a license to any private individual or corporation for the construction of a dam, it shall give written notice to the Secretary of the Interior (hereafter referred to as the Secretary) setting forth the site of the proposed dam and the approximate area to be flooded and otherwise changed if such construction is undertaken: *Provided,* That with respect to any floodwater retarding dam which provides less than five thousand acre-feet of detention capacity and with respect to any other type of dam which creates a reservoir of less than forty surface acres the provisions of this section shall apply only when the constructing agency, in its preliminary surveys, finds, or is presented with evidence that historical or archeological materials exist or may be present in the proposed reservoirs area. (74 Stat. 220, § 1(2), Act of May 24, 1974, 88 Stat. 174; 16 U.S.C. § 469a)

EXPLANATORY NOTE

1974 Amendment. The Act of May 24, 1974 (Public Law 93-291, 88 Stat. 174) amended section 2 by: redesignating subsection (a) as section 2 and inserting therein "(hereafter referred to as the Secretary)" following "Secretary of the Interior"; amending and transferring former subsection (b) to new sections 3 and 4; redesignating former subsections (c) and (e) as subsections (a) and (b), respectively, of section 5; and deleting former subsection (d). The 1974 Act does not appear herein.

Sec. 3. (a) [Notice to agency of possible loss or destruction of data—Agency to report to Secretary—Investigation.]—Whenever any Federal agency finds, or is notified, in writing, by an appropriate historical or archeological authority, that its activities in connection with any Federal construction project or federally licensed project, activity, or program may cause irreparable loss or destruction of significant scientific, prehistorical, historical, or archeological data, such agency shall notify the Secretary, in writing, and shall provide the Secretary with appropriate information concerning the project, program, or activity. Such agency may request the Secretary to undertake the recovery, protection, and preservation of such data (including preliminary survey, or other investigation as needed, and analysis and publication of the reports resulting from such investigation), or it may, with funds appropriated for such project, program, or activity, undertake such activities. Copies of reports of any investigations made pursuant to this section shall be submitted to the Secretary, who shall make them available to the public for inspection and review.

(b) [Secretary to undertake survey—Conditions—Compensation.]—Whenever any Federal agency provides financial assistance by loan, grant, or otherwise to any private person, association, or public entity, the Secretary, if he determines that significant scientific, prehistorical, historical, or archaeological data might be irrevocably lost or destroyed, may with funds appropriated expressly for this purpose conduct, with the consent of all persons, associations, or public entities having a legal interest in the property involved, a survey of the affected site and undertake the recovery, protection, and preservation of such data (including analysis and publication). The Secretary shall, unless otherwise mutually agreed to in writing, compensate any person, association, or public entity damaged as a result of delays in construction or as a result of the temporary loss of the use of private or any nonfederally owned lands. (Added by Act of May 24, 1974, § 1(3), 88 Stat. 174; 16 U.S.C. § 469a-1)

EXPLANATORY NOTE

1974 Amendment. Section 3 was added by section 1(3) of the Act of May 24, 1974 (Public Law 93-291, 88 Stat. 174). The 1974 Act does not appear herein.

Sec. 4. [Notice to Secretary of possible loss or destruction of data—Survey and preservation of data—Exceptions—Time limit—Compensation.]—(a) The Secretary, upon notification, in writing, by any Federal or State agency or appropriate historical or archeological authority that scientific, prehistorical, historical, or archeological data is being or may be irrevocably lost or destroyed by any Federal or federally assisted or licensed project, activity, or program, shall, if he determines that such data is significant and is being or may be irrevocably lost or destroyed and after reasonable notice to the agency responsible for funding or licensing such project, activity, or program, conduct or cause to be conducted a survey and other investigation of the areas which are or may be affected and recover and preserve such data (including analysis and publication) which, in his opinion, are not being, but should be, recovered and preserved in the public interest.

(b) No survey or recovery work shall be required pursuant to this section which, in the determination of the head of the responsible agency, would impede Federal or federally assisted or licensed projects or activities undertaken in connection with any emergency, including projects or activities undertaken in anticipation of, or as a result of a natural disaster.

(c) The Secretary shall initiate survey or recovery effort within sixty days after notification to him pursuant to subsection (a) of this section or within such time as may be agreed upon with the head of the agency responsible for funding or licensing the project, activity, or program in all other cases.

(d) The Secretary shall, unless otherwise mutually agreed to in writing, compensate any person, association, or public entity damaged as a result of delays in construction or as a result of the temporary loss of the use of private or nonfederally owned land. (Added by Act of May 24, 1974, § 1(3), 88 Stat. 174; 16 U.S.C. § 469a-2)

EXPLANATORY NOTE

1974 Amendment. Section 4 was added by section 1(3) of the Act of May 24, 1974 (Public Law 93-291, 88 Stat. 174). The 1974 Act does not appear herein.

Sec. 5.(a) [Agency responsible for funding or licensing the project shall be kept apprised of the progress of the survey.]—The Secretary shall keep the agency responsible for funding or licensing the project notified at all times of the progress of any survey made under this Act, or of any work undertaken as a result of such survey, in order that there will be as little disruption or delay as possible in the carrying out of the functions of such agency and the survey and recovery programs shall terminate at a time mutually agreed upon by the Secretary and the head of such agency unless extended by mutual agreement.

(b) [The Secretary to consult with other agencies, organizations, etc., to determine proper disposition of relics and specimens.]—The Secretary shall consult with any interested Federal and State agencies, educational and scientific organizations, and private institutions and qualified individuals, with a view to determining the ownership of and the most appropriate repository for any relics and specimens recovered as a result of any work performed as provided for in this section.

(c) [Coordination of Federal activities—Report required.]—The Secretary shall coordinate all Federal survey and recovery activities authorized under this Act and shall submit an annual report at the end of each fiscal year to the Committee on Interior and Insular Affairs of the House of Representatives and Committee on Energy and Natural Resources of the Senate indicating the scope and effectiveness of the program, the specific projects surveyed and the results produced, and the costs incurred by the Federal Government as a result thereof. (74 Stat. 220; Act of May 24, 1974, § 1(4), (6), (7), 88 Stat. 175; Act of March 12, 1980, § 608 (b)(1), 94 Stat. 92; 16 U.S.C. § 469a-3)

EXPLANATORY NOTES

1980 Amendment. Section 608(b)(1) of the Act of March 12, 1980 (Public Law 96-205, 94 Stat. 92) amended subsection (c) by substituting references to the House Committee on Interior and Insular Affairs and the Senate Committee on Energy and Natural Resources for the reference to the Interior and Insular Affairs Committees of the Congress. The 1980 Act does not appear herein.

1974 Amendment. Section 1, paragraphs (4), (6), and (7), of the Act of May 24, 1974 (Public Law 93-291, 88 Stat. 175) amended the Act of June 27, 1960 by: redesignating former subsection (c) of section 2 as subsection (a) of section 5; substituting "agency responsible for funding or licensing the project" for "instigating agency"; substituting "agency and the survey and recovery programs shall terminate at a time mutually agreed upon by the Secretary and the head of such agency unless extended by mutual agreement" for "agency"; redesignating former subsection (e) of section 2 as subsection (b) of section 5; and adding subsection (c) as it appears in the text. The 1974 Act does not appear herein.

Sec. 6. [General administrative authority.]—In the administration of this Act, the Secretary may—

(1) enter into contracts or make cooperative agreements with any Federal or State agency, any educational or scientific organization, or any institution, corporation, association, or qualified individual; and

(2) obtain the services of experts and consultants or organizations thereof in accordance with section 3109 of title 5, United States Code; and

(3) accept and utilize funds made available for salvage archaeological purposes by any private person or corporation or transferred to him by any Federal agency. (74 Stat. 221; Act of May 24, 1974, § 1(8), 88 Stat. 175; 16 U.S.C. § 469b)

EXPLANATORY NOTE

1974 Amendment. Section 1(8) of the Act of May 24, 1974 (Public Law 93-291, 88 Stat. 175) redesignated former section 3 as section 6, and amended paragraphs (2) and (3) to read as they appear in the text. The 1974 Act does not appear herein.

Sec. 7. [Funding assistance by Federal agencies responsible for construction of projects—One per centum limitation—Authorization of appropriations.]—(a) To carry out the purposes of sections 1 to 8 of this Act any Federal agency responsible for a construction project may assist the

Secretary and/or it may transfer to him such funds as may be agreed upon, but not more than 1 per centum of the total amount authorized to be appropriated for such project, except that the 1 per centum limitation of this section shall not apply in the event that the project involves $50,000 or less: *Provided,* That the costs of such survey, recovery, analysis, and publication shall be considered nonreimbursable project costs.

(b) For the purposes of section 3 (b) of this Act, there are authorized to be appropriated such sums as may be necessary, but not more than $500,000 in fiscal year 1974; $1,000,000 in fiscal year 1975; $1,500,000 in fiscal year 1976; $1,500,000 in fiscal year 1977; $1,500,000 in fiscal year 1978; $500,000 in fiscal year 1979; $1,000,000 in fiscal year 1980; $1,500,000 in fiscal year 1981; $1,500,000 in fiscal year 1982; and $1,500,000 in fiscal year 1983.

(c) For the purposes of section 4 (a) of this Act, there are authorized to be appropriated not more than $2,000,000 in fiscal year 1974; $2,000,000 in fiscal year 1975; $3,000,000 in fiscal year 1976; $3,000,000 in fiscal year 1977; $3,000,000 in fiscal year 1978; $3,000,000 in fiscal year 1979; $3,000,000 in fiscal year 1980; $3,500,000 in fiscal year 1981; $3,500,000 in fiscal year 1982; and $4,000,000 in fiscal year 1983.

(d) Beginning fiscal year 1979, sums appropriated for purposes of this section shall remain available until expended. (74 Stat. 221; Act of May 24, 1974, § 1(9), 88 Stat. 175; Act of November 10, 1978, §603, 92 Stat. 3518; 16 U.S.C. § 469c)

EXPLANATORY NOTES

1978 and 1974 Amendments. Section 1(9) of the Act of November 10, 1978 (Public Law 95-625, 92 Stat. 3518) and section 603 of the Act of May 24, 1974 (Public Law 93-291, 88 Stat. 175) amended the Act of June 27, 1960 by redesignating former section 4 as section 7 and revising and adding to the text thereof to read as it appears above. Neither the 1978 or 1974 Act appears herein.

Cross Reference, Special Provisions For Costs Relating to Historic Properties. Section 208 of the Act of December 12, 1980 (Public Law 96-515, 94 Stat. 2997, 16 U.S.C. § 469c-2) provides that, notwithstanding section 7(a) or any other provision of law to the contrary: identification, surveys and evaluation carried on with respect to historic properties may be treated as project planning costs and not as mitigation costs; reasonable costs for such activities, as well as for data recovery, with respect to historic properties, may be charged to Federal licensees and permitees as a condition to issuance of the license or permit; and that Federal agencies, with the concurrence of the Secretary and after notifying the House Committee on Interior and Insular Affairs and the Senate Committee on Energy and Natural Resources, are authorized to waive, in appropriate cases, the 1 per centum limitation in section 7(a). The 1980 Act does not appear herein.

NOTE OF OPINION

1. Colorado River Storage Project

Funding from section 8 of the Colorado River Storage Project Act of 1956 is, as a practical matter, unavailable to archaeological conservation efforts connected with the Dolores and Animas-LaPlata Projects since that section authorizes only archaeological conservation which can be accomplished through the establishment of public recreational facilities. However, funding is available through the Act of June 27, 1960 (74 Stat. 220), as amended by Public Law 93-291, but is limited to a maximum of one per cent of the amount authorized to be appropriated for the projects. Memorandum of Associate Solicitor Leshy to Commissioner, Water and Power Resources Service, April 11, 1980.

Sec. 8. ["State" defined.]—As used in sections 1 to 8 of this Act, the term "State" includes the several States of the Union, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands. (Added by Act of March 12, 1980, § 608 (b) (2), 94 Stat. 92; 16 U.S.C. § 469c-1)

EXPLANATORY NOTE

1980 Amendment. Section 608(b)(2) of the Act of March 12, 1980 (Public Law 96-205, 94 Stat. 92) amended the Act of June 27, 1960 by adding section 8 as it appears above. The 1980 Act does not appear herein.

NORMAN PROJECT

Pages 1535-1537

EXPLANATORY NOTE

Codification Omitted. The Act of June 27, 1960 (Public Law 86-529, 74 Stat. 225), authorizing the Norman Project, originally was codified at 43 U.S.C. §§ 615aa to 615hh but was omitted from the 1976 and subsequent editions of the U.S. Code as having limited applicability.

FLOOD CONTROL ACT OF 1960

Pages 1544-1545

Sec. 203. [Projects authorized.]—

* * * * *

EXPLANATORY NOTE

Subsequent Modification and Authorization: Cochiti Reservoir. Section 194 of the Water Resources Development Act of 1976 (Public Law 94-587, 90 Stat. 2917) modified the project for the Cochiti Reservoir in New Mexico by directing the Secretary of the Army to construct, for public recreation purposes, an access road from U.S. Highway 85 to such Reservoir. Extracts from the 1976 Act, including section 194, appear in Volume IV in chronological order.

Page 1547

Sec. 206. [Chief of Engineers authorized to compile and disseminate information on floods and flood damages—Surveys and guides for State and local interests may be made only at the request of a State or responsible local governmental agency—Expenditures not to exceed $7 million in any one fiscal year.]—

* * * * *

(b) The Secretary of the Army is authorized to expend not to exceed $15,000,000 per fiscal year for the compilation and dissemination of information under this section. (74 Stat. 500; Act of November 7, 1966; 80 Stat. 1422; § 225, Act of December 31, 1970, 84 Stat. 1832; § 64, Act of March 7, 1974, 88 Stat. 30; 33 U.S.C. § 709a)

EXPLANATORY NOTE

1970 and 1974 Amendments. Section 225 of the Flood Control Act of December 31, 1970 (Public Law 91-611, 84 Stat. 1818) and section 64 of the Water Resources Development Act of March 7, 1974 (Public Law 93-251, 88 Stat. 12) amended section 206(b) by increasing the fiscal year expenditure authorization to $11,000,000 and $15,000,000 respectively. Extracts from the 1970 and 1974 Acts, not including sections 225 and 64, appear in Volume IV in chronological order.

Page 1548

Sec. 207. [Definitions—Reconstruction or replacement of roads.]—*Amended.*

EXPLANATORY NOTE

1974 Amendment. Section 207(c) of the Flood Control Act of 1960, as amended by section 208 of the Flood Control Act of 1962, was further amended by section 13 of the Water Resources Development Act of March 7, 1974 (Public Law 93-251, 88 Stat. 17). The amendment is explained in this Supplement I under the 1962 Act, which appears at pages 1704-1705 of Volume III. Extracts from the 1974 Act, including section 13, appear in Volume IV in chronological order.

WATER DELIVERY AFTER DEATH OF SPOUSE

Page 1550

[Water may be delivered to lands that become excess due to death of a spouse so long as surviving spouse does not remarry.]—

* * * * *

EXPLANATORY NOTE

Supplementary Provision: Changes in Acreage Limitations, Pricing and Contracts. The Reclamation Reform Act of 1982 (Title II, Act of October 12, 1982, Public Law 97-293, 96 Stat. 1261, 1263, 43 U.S.C. §§ 390aa et seq.) makes major changes in the acreage limitations on, the pricing of, and the contracts for the delivery of irrigation water from Reclamation projects. Among these, section 202(4) of the 1982 Act defines the term "individual" to mean any natural person, including his or her spouse, and section 216 deals with lands acquired by inheritance or devise. The 1982 Act appears in Volume IV in chronological order.

NOTE OF OPINION

1. When applies

The Act of September 2, 1960 does not give the widow of a man who died in 1956, before there was a Reclamation project serving the Westlands Water District, the right to receive water for 320 acres under the water service contract signed with the district in 1963. Letter of Associate Solicitor Miron to Breckinridge Thomas, M-36751, September 6, 1968.

PUBLIC WORKS APPROPRIATION ACT, 1961

Pages 1551-1552

[Rainbow Bridge protection denied.]—

* * * * *

EXPLANATORY NOTE

Provision Repeated. A similar proviso is contained in each subsequent annual appropriation act through the most recent one reviewed for this publication, the Energy and Water Development Appropriation Act, 1982 (95 Stat. 1139), which was continued for fiscal year 1983 by section 101(f) of the Further Continuing Appropriations Act for Fiscal Year 1983 (96 Stat. 1906).

NOTE OF OPINION

1. Rainbow Bridge

Congress has repealed the last sentence of section 3 of the Colorado River Storage Project Act and the proviso of section 1(2) of that same Act, both designed to protect the Rainbow Bridge, by (1) disallowing from the Public Works Appropriation Act, 1961, an appropriation to initiate construction of facilities to protect Rainbow Bridge National Monument after specifically finding that the impoundment of water in Glen Canyon Reservoir would not result in any structural damage to the bridge, and (2) by including in the 1961 Appropriations Act and all subsequent public works appropriations acts through 1973 a proviso prohibiting the use of funds appropriated for the Upper Colorado River Basin Fund for construction or operation of facilities to prevent waters of Lake Powell from entering any national monument. Nor can a court order that the Glen Canyon Dam be operated at a reduced level so that the lake would not exceed the level at which it reaches the outer boundary of the monument, as this would have the effect of placing the Glen Canyon facilities, as related to others in the overall system, at about one-half design capacity. To so radically change the effectiveness of the principal regulating reservoir would prevent the attainment of the objectives of the Colorado River Compacts, the Colorado River Storage Project Act, and the Colorado River Basin Project Act. *Friends of the Earth v. Armstrong*, 485 F.2d 1 (10th Cir. 1974), cert. denied, 414 U.S. 1171 (1974); accord, *Badoni v. Higginson*, 455 F. Supp. 641 (D. Utah 1977), aff'd, 638 F.2d 172 (10th Cir. 1980), cert. denied, 452 U.S. 954 (1981).

WESTERN DIVISION, THE DALLES PROJECT

Pages 1554-1555

EXPLANATORY NOTE

Codification Omitted. The Act of September 13, 1960 (Public Law 86-745, 74 Stat. 882), authorizing the Western Division of The Dalles Project, originally was codified at 43 U.S.C. §§ 615v to 615x but was omitted from the 1976 and subsequent editions of the U.S. Code as having limited applicability.

CONSOLIDATED FARM AND RURAL DEVELOPMENT ACT

* * * * *

TITLE III—AGRICULTURAL CREDIT

Page 1606

Sec. 301.(a) [Short title.]—This title may be cited as the "Consolidated Farm and Rural Development Act." (75 Stat. 307; Act of August 30, 1972, 86 Stat. 657; 7 U.S.C. § 1921, note)

EXPLANATORY NOTE

Change of Short Title. Section 101 of the Rural Development Act of 1972 (Act of August 30, 1972, Public Law 92-419, 86 Stat. 657) amended Section 301(a) of the Consolidated Farmers Home Administration Act of 1961 to provide that title III may be cited as the "Consolidated Farm and Rural Development Act." The 1972 Act does not appear herein.

* * * * *

SUBTITLE A—REAL ESTATE LOANS

Pages 1606-1608

Sec. 306. (a) [Loans and grants for rural land, water, waste disposal, electric transmission and other community facilities and activities—Criteria—Definitions—Limitation on allowable uses of Federal funds—Inclusion of interest or other income in gross income on sale of insured loans.]—(1) The Secretary is also authorized to make or insure loans to associations, including corporations not operated for profit, Indian tribes on Federal and State reservations and other federally recognized Indian tribes, and public and quasi-public agencies to provide for the application or establishment of soil conservation practices, shifts in land use, the conservation, development, use, and control of water, and the installation or improvement of drainage or waste disposal facilities, recreational developments, and essential community facilities including necessary related equipment, all primarily serving farmers, ranchers, farm tenants, farm laborers and other rural residents, and to furnish financial assistance or other aid in planning projects for such purposes. When any loan made for a purpose specified in this paragraph is sold out of the Agricultural Credit Insurance Fund as an insured loan, the interest or other income thereon paid to an insured holder shall be included in gross income for purposes of chapter 1 of the Internal Revenue Code of 1954. With respect to loans of less than $500,000 made or insured under this paragraph that are evidenced by notes and mortgages, as distinguished from bond issues, borrowers shall not be required to appoint bond counsel to review the legal validity of the loan whenever the Secretary has available legal counsel to perform such review.

(2) The Secretary is authorized to make grants aggregating not to exceed $500,000,000 in any fiscal year to such associations to finance specific projects for works for the development, storage, treatment, purification, or distribution of water or the collection, treatment, or disposal of waste in rural areas: *Provided*, That for fiscal years commencing after September 30, 1981, such grants may not exceed $154,900,000 in any fiscal year. The amount of any grant made under the authority of this paragraph shall not exceed 75 per centum of the development cost of the project to serve the area which the association determines can be feasibly served by the facility and to adequately serve the reasonably foreseeable growth needs of the area.

(3) No grant shall be made under paragraph (2) of this subsection in connection with any project unless the Secretary determines that the project (i) will serve a rural area which, if such project is carried out, is not likely to decline in population below that for which the project was designed, (ii) is designed and constructed so that adequate capacity will or can be made available to serve the present population of the area to the extent feasible and to serve the reasonably foreseeable growth needs of the area, and (iii) is necessary for an orderly community development consistent with a comprehensive community water, waste disposal, or other development plan of the rural area and not inconsistent with any planned development provided in any State, multi-jurisdictional, county, or municipal plan approved by competent authority for the area in which the rural community is located, and the Secretary shall require the submission of all applications for financial assistance under this section to the multijurisdictional substate areawide general purpose planning and development agency that has been officially designated as a clearinghouse agency under Office of Management and Budget Circular A–95 and to the county or municipal government having jurisdiction over the area in which the proposed project is to be located for review and comment within a designated period of time not to exceed 30 days concerning among other considerations, the effect of the project upon the areawide goals and plans of such agency or government. No loan under this section shall be made that is inconsistent with any multijurisdictional planning and development district areawide plan of such agency. The Secretary is authorized to reimburse such agency or government for the cost of making the required review. Until October 1, 1973, the Secretary may make grants prior to the completion of the comprehensive plan, if the preparation of such plan has been undertaken for the area..

(4)(A) The term"development cost" means the cost of construction of a facility and the land, easements, and rights-of-way, and water rights necessary to the construction and operation of the facility.

(B) The term "project" shall include facilities providing central service or facilities serving individual properties, or both.

(5) *Repealed.* (Pub. L. 92–419, title I, § 110, Aug. 30, 1972, 86 Stat. 659)

(6) The Secretary may make grants aggregating not to exceed $30,000,000 in any fiscal year to public bodies or such other agencies as the Secretary may determine having authority to prepare comprehensive plans for the development of water or waste disposal systems in rural areas which do not have funds available for immediate undertaking of the preparation of such plan.

(7) As used in this chapter, the terms "rural" and "rural area" shall not include any area in any city or town which has a population in excess of ten thousand inhabitants, except that (A) for the purpose of loans for essential community facilities under subsection (a)(1) of this section, the terms "rural" and "rural area" may include any area in any city or town that has a population not in excess of twenty thousand inhabitants; and (B) for purposes of loans and grants for private business enterprises under sections 304(b), 310B, and 312(b), (c), and (d) of this title the terms "rural" and "rural area" may include all territory of a State that is not within the outer boundary of any city having a population of fifty thousand or more and its immediately adjacent urbanized and urbanizing areas with a population density of more than one hundred persons per square mile, as determined by the Secretary of Agriculture according to the latest decennial census of the United States: *Provided*,That special consideration for such loans and grants shall be given to areas other than cities having a population of more than twenty-five thousand.

(8) In each instance where the Secretary receives two or more applications for financial assistance for projects that would serve substantially the same group of residents within a single rural area, and one such application is submitted by a city, town, county or other unit of general local government, he shall, in the absence of substantial reasons to the contrary, provide such assistance to such city, town, county or other unit of general local government.

(9) No Federal funds shall be authorized for use unless it be certified by the appropriate State water pollution control agency that the water supply system authorized will not result in pollution of waters of the State in excess of standards established by that agency.

(10) In the case of sewers and waste disposal systems, no Federal funds shall be advanced hereunder unless the appropriate State water pollution control agency shall certify that the effluent therefrom shall conform with appropriate State and Federal water pollution control standards when and where established.

(11) The Secretary may make grants, not to exceed $15,000,000 annually, to public bodies or such other agencies as the Secretary may select to provide rural development technical assistance, rural community leadership development, and community and areawide rural development planning.

(12)(A) The Secretary shall, in cooperation with institutions eligible to receive funds under the Act of July 2, 1862 (12 Stat. 503-505, as amended; 7 U.S.C. 301-305, 307 and 308), or the Act of August 30, 1890 (26 Stat. 417-419, as amended; 7 U.S.C. 321-326 and 328), including the Tuskegee

Institute and State, substate, and regional planning bodies, establish a system for the dissemination of information and technical assistance on federally sponsored or funded programs. The system shall be for the use of institutions eligible to receive funds under the Act of July 2, 1862 (12 Stat. 503-505, as amended; 7 U.S.C. 301-305, 307, and 308), or the Act of August 30, 1890 (26 Stat. 417-419, as amended; 7 U.S.C. 321-326 and 328), including the Tuskegee Institute and State, substate, and regional planning bodies, and other persons concerned with rural development.

(B) The informational system developed under this paragraph shall contain all pertinent information, including, but not limited to, information contained in the Federal Procurement Data System, Federal Assistance Program Retrieval System, Catalogue of Federal Domestic Assistance, Geographic Distribution of Federal Funds, United States Census, and Code of Federal Regulations.

(C) The Secretary shall obtain from all other Federal departments and agencies comprehensive, relevant, and applicable information on programs under their jurisdiction that are operated in rural areas.

(D) Of the sums authorized to be appropriated to carry out the provisions of this Act, not more than $1,000,000 per year may be expended to carry out the provisions of this paragraph.

(13) In the making of loans and grants for community waste disposal and water facilities under paragraphs (1) and (2) of this subsection the Secretary shall accord highest priority to the application of any municipality or other public agency (including an Indian tribe on a Federal or State reservation or other federally recognized Indian tribal group) in a rural community having a population not in excess of five thousand five hundred and which, in the case of water facility loans, has a community water supply system, where the Secretary determines that due to unanticipated diminution or deterioration of its water supply, immediate action is needed, or in the case of waste disposal, has a community waste disposal system, where the Secretary determines that due to unanticipated occurrences the system is not adequate to the needs of the community. The Secretary shall utilize the Soil Conservation Service in rendering technical assistance to applicants under this paragraph to the extent he deems appropriate.

(14)(A) The Secretary, under such reasonable rules and conditions as he shall establish, shall make grants to eligible volunteer fire departments for up to 50 per centum of the cost of firefighting equipment needed by such departments but which such departments are unable to purchase through the resources otherwise available to them, and for the cost of the training necessary to enable such departments to use such equipment efficiently.

(B) For the purposes of this subsection, the term "eligible volunteer fire department" means any established volunteer fire department in a rural town, village, or unincorporated area where the population is less than two thousand but greater than two hundred, as reasonably determined by the Secretary.

(15)(A) The Secretary may make or insure loans in the full amount thereof, but not to exceed $1,000,000 for any such loan, to associations, including corporations not operated for profit, Indian tribes on Federal and State reservations and other federally recognized Indian tribes, and public and quasi-public agencies, for the purpose of financing the construction, acquisition, and operation of transmission facilities for any electric system that is owned and operated by a public body located in a rural area and as of October 1, 1976, was receiving bulk power from any of the following agencies of the Department of the Interior:

(i) the Southwestern Power Administration.
(ii) the Southeastern Power Administration.
(iii) the Bonneville Power Administration,
(iv) the Bureau of Reclamation, or
(v) the Alaska Power Administration.

A loan may not be made or insured under this paragraph unless the Secretary determines that the applicant for the loan cannot obtain sufficient credit elsewhere from reliable sources at reasonable rates and terms for financing the construction, acquisition, and operation of such facilities.

(B) Interest or other income from obligations evidencing loans guaranteed under this paragraph shall be included in gross income for the purposes of chapter 1 of the Internal Revenue Code of 1954.

(C) The Administrator of the Rural Electrification Administration shall administer loans made or insured under this paragraph.

(D) The authority provided to the Secretary by subparagraph (A) of this paragraph shall terminate September 30, 2006.

(b) [Curtailment or limitation of service prohibited.]—The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.

(c) *Repealed.* (Pub. L. 91–606, title III, § 302(2), Dec. 31, 1970, 84 Stat. 1759)

(d) [Carryover of unused authorizations for appropriations.]—Any amounts appropriated under this section shall remain available until expended, and any amounts authorized for any fiscal year under this section but not appropriated may be appropriated for any succeeding fiscal year. (75 Stat. 308; § 401(2), Act of September 27, 1962, 76 Stat. 632; Act of October 7, 1965, 79 Stat. 931; § 6(b), Act of November 6, 1966, 80 Stat, 1318; §§ 3-5, Act of August 15, 1968, 82 Stat. 770; § 806(a), Act of November 30, 1970, 84 Stat. 1383; § 302(2), Act of December 31, 1970, 84 Stat. 1759; § 1(a), Act of December 31, 1970, 84 Stat 1855; §§ 104-112, Act of August 30, 1972, 86 Stat. 658; Act of August 10, 1973, 87 Stat, 240; §§ 104-107(a), Act of August 4, 1978, 92 Stat. 421; § 7, Act of September 24, 1980, 94 Stat. 1171; § 2(1), Act of October 13, 1980, 94 Stat. 1174; § 121, Act of August 13, 1981, 95 Stat. 368; 7 U.S.C. § 1926)

Pages 1608-1609

Sec. 307. [Period of repayment—Interest rates.]—(1) The period for repayment of loans under this subtitle shall not exceed forty years.

(2) Except as otherwise provided in paragraphs (3), (4), (5), and (6) of this subsection, the interest rates on loans under this subtitle shall be as determined by the Secretary, but not in excess of the current average market yield on outstanding marketable obligations of the United States with remaining periods to maturity comparable to the average maturities of such loans, plus not to exceed 1 per centum, as determined by the Secretary, and adjusted to the nearest one-eighth of 1 per centum.

(3)(A) Except as provided in paragraph (6), the interest rates on loans (other than guaranteed loans), to public bodies or nonprofit associations (including Indian tribes on Federal and State reservations and other federally recognized Indian tribal groups) for water and waste disposal facilities and essential community facilities shall be set by the Secretary at rates not to exceed the current market yield for outstanding municipal obligations with remaining periods to maturity comparable to the average maturity for such loans, and adjusted to the nearest one-eighth of 1 per centum; and not in excess of 5 per centum per annum for any such loans which are for the upgrading of existing facilities or construction of new facilities as required to meet applicable health or sanitary standards in areas where the median family income of the persons to be served by such facility is below the poverty line prescribed by the Office of Management and Budget as adjusted under section 624 of the Economic Opportunity Act of 1964 (42 U.S.C. 2971d) and in other areas as the Secretary may designate where a significant percentage of the persons to be served by such facilities are of low income, as determined by the Secretary.

(B) Except as provided in paragraph (6), the interest rates on loans (other than guaranteed loans) under section 310D of this title shall be as determined by the Secretary, but not in excess of one-half of the current average market yield on outstanding marketable obligations of the United States with remaining periods to maturity comparable to the average maturities of such loans, nor less than 5 per centum per annum.

(4) Except as provided in paragraph (6), the interest rates on loans under sections 304(b), 306(a)(1), and 310B of this title (other than guaranteed loans and loans as described in paragraph (3) of this subsection) shall be as determined by the Secretary, but not less than such rates as determined by the Secretary of the Treasury taking into consideration the current average market yield on outstanding marketable obligations of the United States with remaining periods to maturity comparable to the average maturities of such loans, adjusted in the judgment of the Secretary of the Treasury to provide for rates comparable to the rates prevailing in the private market for similar loans and considering the Secretary's insurance of the loans, plus an additional charge, prescribed by the Secretary, to cover the Secretary's losses and cost of administration, which charge shall be deposited in the Rural Development Insurance Fund, and further adjusted to the nearest one-eighth of 1 per centum.

(5) The interest rate on any loan made under this subtitle as a guaranteed loan shall be such rate as may be agreed upon by the borrower and the lender, but not in excess of a rate as may be determined by the Secretary.

(6)(A) Notwithstanding any other provision of this section, in the case of loans (other than guaranteed loans) made or insured under the authorities of this title specified in subparagraph (B) for activities that involve the use of prime farmland as defined in subparagraph (C), the interest rates shall be the interest rates otherwise applicable under this section increased by 2 per centum per annum. Wherever practicable, construction by a State, municipality, or other political subdivision of local government that is supported by loans described in the preceding sentence shall be placed on land that is not prime farmland, in order to preserve the maximum practicable amount of prime farmlands for production of food and fiber. Where other options exist for the siting of such construction and where the governmental authority still desires to carry out such construction on prime farmland, the 2 per centum interest rate increase provided by this clause shall apply, but such increased interest rate shall not apply where such other options do not exist.

(B) The authorities referred to in subparagraph (A) are—

(i) clauses (2) and (3) of section 303(a),

(ii) the provisions of section 304(a), relating to the financing of outdoor recreational enterprises or the conversion of farming or ranching operations to recreational uses,

(iii) section 304(b),

(iv) the provisions of section 306(a)(1) relating to loans for recreational developments and essential community facilities,

(v) section 306(a)(15),

(vi) clause (1) of section 310B(a),

(vii) subsections (d) and (e) of section 310B,

(viii) section 310D(a) as it relates to the making or insuring of loans under clauses (2) and (3) of section 303(a).

(C) For purposes of this paragraph, the term "prime farmland" means prime farmlands and unique farmland as those terms are defined in sections 657.5(a) and (b) of title 7, Code of Federal Regulations (1980).

(b) [Payment of charges—Prepayment of taxes and insurance.]—The borrower shall pay such fees and other charges as the Secretary may require, and borrowers under this title shall prepay to the Secretary such taxes and insurance as the Secretary may require, on such terms and conditions as the Secretary may prescribe.

(c) [Mortgages, liens, and other security.]—The Secretary shall take as security for the obligations entered into in connection with loans, mortgages on farms with respect to which such loans are made or such other security as the Secretary may require, and for obligations in connection with loans to associations under section 306 of this title, shall take liens on the facility or such other security as he may determine to be necessary. Such security instruments may constitute liens running to the United States notwithstanding the fact that the notes may be held by lenders other than the United

States. (75 Stat. 308; Act of August 30, 1972, 86 Stat. 660; § 108, Act of August 4, 1978, 92 Stat, 422; § 160(a), Act of August 13, 1981, 95 Stat. 376; 7 U.S.C. § 1927)

EXPLANATORY NOTE

Amendments. Sections 306 and 307 of the Act of August 8, 1961 have been amended numerous times since 1966. It is not deemed necessary to explain those amendments herein.

DELAWARE RIVER BASIN COMPACT

Page 1624

3.5. Supreme Court Decree; Specific Limitations on Commission.

* * * * *

NOTE OF OPINION

1. Charges for water withdrawals and diversions

The restrictions in section 15.1(b) of Part II of the Compact on the imposition of charges for water withdrawals and diversions are not limited to Federal interests in Delaware River water. The phrase "withdrawals or diversions from the Basin" must be interpreted as extending those restrictions to all uses of Delaware River Basin water which have been made possible by Commission facilities. In addition, section 3.5(b) and 15.1(b) of the Compact preclude charging the City of New York and the State of New Jersey for diversions authorized by the Supreme Court Decrees in *New Jersey v. New York*, 347 U.S. 995 (1954). Memorandum from Assistant Solicitor Mauro to United States Commissioner, Delaware River Basin Commission, January 9, 1980.

PUBLIC WORKS APPROPRIATION ACT, 1962

Page 1651

[Alaskan investigations.]—

* * * * *

EXPLANATORY NOTE

Provision Repeated. An appropriation to the Bureau of Reclamation for Alaskan investigations in excess of the $250,000 authorized by the Act of August 9, 1955 (69 Stat. 618) was contained in the Public Works and Atomic Energy Commission Appropriation Act, 1968 (Act of November 20, 1967, 81 Stat. 475). Beginning with the Public Works for Water and Power Resources Development and Atomic Energy Commission Appropriation Act, 1969 (Act of August 12, 1968) a similar appropriation for Alaskan investigations was made to the Alaska Power Administration. The relevant extract from the 1968 Act appears in Volume IV in chronological order.

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Pages 1651-1652

[Upper Colorado River Storage project—Recreational and fish and wildlife expenditures through State and Federal agencies.]—

* * * * *

EXPLANATORY NOTE

Provision Repeated. A similar provision is contained in each annual appropriation act through the Act of September 25, 1979 (93 Stat. 444).

NAVAJO INDIAN IRRIGATION PROJECT AND SAN JUAN-CHAMA PROJECT, INITIAL STAGE

Page 1658

[Sec. 1. Navajo Indian irrigation project and San Juan-Chama project initial stage approved as participating projects of Colorado River storage project.]—

* * * * *

EXPLANATORY NOTE

Codification Omitted. The Act of June 13, 1962 (Public Law 87-483, 76 Stat. 96), authorizing the Navajo Indian Irrigation Project and the San Juan-Chama Project, originally was codified at 43 U.S.C. §§ 615ii to 615zz but was omitted from the 1976 and subsequent editions of the U.S. Code as having limited applicability.

NOTES OF OPINION

2. Authorized project purposes, priorities

It is clear from the Colorado River Storage Project Act and the Act of June 13, 1962 that the principal uses for San Juan-Chama Project water are for irrigation, municipal, industrial, and domestic purposes, and all other uses, including recreation and fish and wildlife, are merely incidental. Thus, the storage in the Elephant Butte Reservoir of water purchased by Albuquerque from the Heron Reservoir is prohibited where the sole purpose is for recreational use, even assuming such storage would be permitted under the law of New Mexico. *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126 (10th Cir. 1981).

Because Congress has used both the term "municipal" and the term "recreational" with regard to the purposes for which water from the San Juan-Chama Project may be used, and as these terms have distinct meanings, the mere fact that excess water is to be stored at the Elephant Butte Reservoir for recreational purposes by the City of Albuquerque does not transform a recreational use into a municipal use. Because, under the Colorado River Storage Project Act, recreation use is only incidental to municipal use, recreation, whether provided by Albuquerque or otherwise, could not justifiably constitute the only use of a large amount of San Juan-Chama water. *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126 (10th Cir. 1981).

The fact that the Act of March 26, 1964 authorized permanent storage at Cochiti Reservoir of 50,000 acre feet of San Juan-Chama water, plus annual additions sufficient to offset evaporation, for recreation and fish and wildlife purposes, combined with the fact that section 1404 of the Reclamation Development Act of 1974 authorizes the release of water from Heron Reservoir to provide up to 50,000 acre feet plus evaporation loss annually to Elephant Butte for a recreation pool, does not demonstrate that storage at Elephant Butte is prohibited absent express Congressional authorization. Storage at Elephant Butte for purposes which are Congressionally authorized and which constitute beneficial uses under State law would not violate the provisions of the Colorado River Storage Project Act and the Act of June 13, 1962. Rather, the Act of March 26, 1964 and section 1401 of the Reclamation Development Act were passed in order to provide authorization because water was to be released without a contract as required by section 11 of the Act of June 13, 1962 and to be used solely for recreational purposes. It cannot be inferred from these statutes that water received by contract purchasers is not to be stored at Elephant Butte for municipal, industrial, or irrigation purposes. *Jicarilla Apache Tribe v. United States*,657 F.2d 1126 (10th Cir. 1981).

Nothing in section 301(b) of the Water Supply Act of 1958 suggests that a municipality such as the City of Albuquerque may place, solely for recreational purposes, the excess water it receives from the Heron Reservoir, San Juan-Chama Project, into storage in the Elephant Butte Reservoir. Even if the statute is read to permit storage by a municipality for any purpose, the specific terms and conditions of the Colorado River Storage Project Act and the Act of June 13, 1962, which make recreational use only incidental to the primary purposes of municipal, industrial, and irrigation uses, override conflicting authority in section 301(b). *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126 (10th Cir. 1981).

Assuming that the Federal Water Project Recreation Act, which authorizes consideration of opportunities for recreation and wildlife enhancement, applies to San Juan-Chama Project water, nothing in the statute authorizes storage solely for recreational purposes. The statute does not suggest that the specific limitations of the Colorado River Storage Project Act and the Act of June 13, 1962, which make recreational use only incidental to irrigation, municipal, and industrial use, should be ignored in favor of recreation or wildlife. *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126 (10th Cir. 1981).

The legislative history of the Act of June 13, 1962 demonstrates that Congress recognized the critical shortage of water in the Rio Grande Basin and that the language in sections 1 and 8 of that Act was deliberately intended to make recreation and fish and wildlife benefits incidental to municipal, industrial, and agricultural water use. Thus, the Act and its history fail to support a finding that water for recreation and fish and wildlife purposes was not directly allocated by the Act solely to limit Federal expenditures because, under section 8 of the Colorado River Storage Project Act, such allocations would make a proportionate share of such project costs nonreimbursable, while the expense of water allocated to municipal water supply must be recovered under section 6 of that Act. *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126 (10th Cir. 1981).

Pages 1658-1659

Sec. 2. [Navajo Indian irrigation project.]—

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EXPLANATORY NOTE

Supplementary Provision: Water Quality Standards. Section 2 of the Act of September 25, 1970 (Public Law 91–416, 84 Stat. 867) provides that the Navajo Indian irrigation project shall be operated in such manner that identifiable flows of water will not cause the project to be in violation of water quality standards promulgated pursuant to the Water Quality Act of October 2, 1965 (Public Law 89–234, 79 Stat. 903). That Act amended in part the Federal Water Pollution Control Act of 1956. The 1970 Act appears in Volume IV in chronological order; the 1965 Act does not appear herein; and the 1956 Act appears in Volume II at page 1278. The 1965 and 1956 Acts were substantially revised and amended by the Federal Water Pollution Control Act Amendments of 1972 (Act of October 18, 1972, Public Law 92–500, 86 Stat. 816), often referred to as the Clean Water Act, which are codified at 33 U.S.C. §§ 1251-1266, 1281-1297, 1311-1328, 1341-1345, and 1361-1376. Extracts from the 1972 Amendments appear in volume IV in chronological order.

NOTES OF OPINIONS

Authorized use of project water 2-5
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Sprinkler, in lieu of gravity, irrigation 6-9
  Authority for 6
  Use of water saved 7

2. Authorized use of project water—Irrigation principal purpose

In light of the current limitations on the delivery capacity of the main project canal and the fact that the preconditions to use of water for non-irrigation purposes established by section 4 (execution of repayment contracts and additional appropriations) have not been met, the Secretary is not authorized, under present circumstances, to deliver water for uses other than irrigation on the Navajo Indian Irrigation Project. Memorandum of Solicitor Coldiron to Assistant Secretary, Land and Water Resources, April 23, 1982.

The Secretary has no authority, even with the consent of the Navajo Indians, to contract for the delivery of any amount of water from the Navajo Reservoir which would impair the availability of water for the irrigation of 110,630 acres of Navajo Indian land because (1) section 2 of the Navajo Indian Irrigation Project Act expressly provides that the principal purpose of the project is to furnish irrigation water to the Indian land, (2) section 4 of the Act authorizes capacity for water for municipal and industrial and miscellaneous uses only to the extent such water exceeds the diversion requirements for irrigation of the 110,630 acres of land, and (3) section 11(a) prohibits the Secretary from entering into contracts that would result in less than a reasonable amount of water, in the event of a shortage, being available for diversion requirements of the Navajo Irrigation Project. Letter of Assistant Secretary Holum to Senator Clinton P. Anderson, October 24, 1967, answering questions on certain proposed contracts for the delivery of water from the Navajo Reservoir.

5.—Limitation on entitlement

The project feasibility report, incorporated by reference in section 1, and the legislative history of the Act of June 13, 1962, indicate that stream depletions (diversions from the river less return flows) based upon consumptive use, and not merely diversions, should define the limit on Navajo Indian Irrigation Project water use. Thus, while an average annual diversion of up to 508,000 acre-feet is authorized by the Act, the entitlement of the Navajos is limited to the beneficial consumptive use of that quantity of water necessary to meet the irrigation requirements of 110,630 acres of land. To allow total water use based only upon the quantity authorized to be diverted would have a clear, substantial, and adverse impact upon the availability of water in the Colorado River system for existing and proposed uses by other New Mexico water users. Memorandum of Solicitor Coldiron to Assistant Secretary, Land and Water Resources, April 23, 1982.

6. Sprinkler, in lieu of gravity, irrigation—Authority for

In lieu of the originally contemplated gravity irrigation system for Block I of the Navajo Indian Irrigation Project, the Commissioner of Reclamation is authorized to substitute a sprinkler irrigation system which will save water, be less expensive, more efficient, and, in general, be superior to the gravity system. Modifications in the original plan due to improvements in technology and farm-system operations are implicitly authorized by the Act so long as appropriations in excess of the authorized ceiling are not required, as such changes are designed to better realize Congressional intent. Memorandum of Assoicate Solicitor Robison to Commissioner of Reclamation, April 2, 1974.

7.—Use of water saved

Additional water supplies that may be available because of the water saved as a result of the conversion of the Navajo Indian Irrigation Project from a gravity irrigation system to a sprinkler irrigation system are subject to appropriation by others once the Navajo's irrigation needs have been met in full. Memorandum of Solicitor Coldiron to Assistant Secretary, Land and Water Resources, April 23, 1982.

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Sec. 3. (a) [Trust status of certain irrigable lands—Publication in Federal Register—Mineral leasing.]—In order to provide for the most economical development of the Navajo Indian irrigation project, the Secretary shall declare by publication in the Federal Register that the United States of America holds in trust for the Navajo Tribe of Indians any legal subdivisions or unsurveyed tracts of federally owned land outside the present boundary of Navajo Indian Reservation in New Mexico in townships 28 and 29 north, ranges 10 and 11 west, townships 27 and 28 north, ranges

12 and 13 west, townships 26 and 27 north, range 11 west, and townships 24, 25, and 26 north, ranges 12 and 13 west, New Mexico principal meridian, susceptible to irrigation as part of the project or necessary for location of any of the works or canals of such project: *Provided, however,* That no such legal subdivision or unsurveyed tract shall be so declared to be held in trust by the United States for the Navajo Tribe until the Navajo Tribe shall have paid the United States the full appraised value thereof: *And provided further,* That in making appraisals of such lands the Secretary shall consider their values as of the date of approval of this Act, excluding therefrom the value of minerals subject to leasing under the Act of February 25, 1920, as amended (30 U.S.C. 181-286), and such leasable minerals shall not be held in trust for the Navajo Tribe but shall continue to be subject to leasing under the Act of February 25, 1920, as amended, after the lands containing them have been declared to be held in trust by the United States for the Navajo Tribe.

* * * * *

(d) [Cancellation of permits—Reimbursement.]—Each permit that is in effect on lands declared to be held in trust for the Navajo Tribe pursuant to section 3(a) of this Act shall continue in effect for the term thereof unless the land is needed for irrigation purposes, subject to regulations applicable to permits of Indian lands, and upon its expiration it shall only be renewed on an annual basis until the land is required for irrigation purposes. When, in the judgment of the Secretary of the Interior, such land is required for irrigation purposes, the Secretary shall notify the permittee and the permit shall be deemed to be canceled, with no right of appeal. The permittee shall be compensated by the Navajo Tribe for the reasonable value of any range improvements of a permanent nature placed on the lands under authority of a permit or agreement with the United States, as determined by the Secretary of the Interior. Amounts paid to the United States by the Navajo Tribe out of tribal funds for the full appraised value of lands declared to be held in trust for the Navajo Tribe pursuant to section 3(a) of this Act shall be reduced by the amount of compensation paid by the Navajo Tribe to permittees pursuant to this subsection. (76 Stat. 96; § 1(a), (c), Act of September 25, 1970, 84 Stat. 867)

EXPLANATORY NOTE

1970 Amendment. The Act of September 25, 1970 (Public Law 91-416, 84 Stat. 867) amended section 3 by: deleting "and" in the first sentence of subsection (a) immediately preceding "townships 27"; inserting "townships 26 and 27 north, range 11 west, and townships 24, 25, and 26 north, ranges 12 and 13 west," immediately preceding "New Mexico principal meridian"; and adding subsection (d). The report of the Senate Committee on Interior and Insular Affairs states that the purpose of the amendments is to (1) "include additional townships in the area from which the project lands may be obtained," and (2) "provide authority for the Secretary to make certain reimbursement to persons having grazing permits, licenses, or leases on lands which are taken for the project." S. Rept. No. 363, 91st Cong., 1st Sess. 2 (1969). The 1970 Act appears in Volume IV in chronological order.

Pages 1659-1660

Sec. 4. [Additional capacity.]—

* * * * *

NOTES OF OPINIONS

1. Limitations on authority

In light of the current limitations on the delivery capacity of the main project canal and the fact that the preconditions to use of water for non-irrigation purposes established by section 4 (execution of repayment contracts and additional appropriations) have not been met, the Secretary is not authorized, under present circumstances, to deliver water for uses other than irrigation on the Navajo Indian Irrigation Project. Memorandum of Solicitor Coldiron to Assistant Secretary, Land and Water Resources, April 23, 1982.

The Secretary has no authority, even with the consent of the Navajo Indians, to contract for the delivery of any amount of water from the Navajo Reservoir which would impair the availability of water for the irrigation of 110,630 acres of Navajo Indian land because (1) section 2 of the Navajo Indian Irrigation Project Act expressly provides that the principal purpose of the project is to furnish irrigation water to the Indian land, (2) section 4 of the Act authorizes capacity for water for municipal and industrial and miscellaneous uses only to the extent such water exceeds the diversion requirements for irrigation of the 110,630 acres of land, and (3) section 11(a) prohibits the Secretary from entering into contracts that would result in less than a reasonable amount of water, in the event of a shortage, being available for diversion requirements of the Navajo Irrigation Project. Letter of Assistant Secretary Holum to Senator Clinton P. Anderson, October 24, 1967, answering questions on certain proposed contracts for the delivery of water from the Navajo Reservoir.

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Sec. 7. [Appropriation.]—There are hereby authorized to be appropriated to the Bureau of Indian Affairs such sums as may be required to construct the Navajo Indian irrigation project, including the purchase of lands under section 3, subsection (c), of this Act, but not more than $206,000,000 (April 1970 prices) plus or minus such amounts, if any, as may be required by reason of changes in construction costs as indicated by engineering cost indices applicable to the types of construction involved therein. (76 Stat. 97; § 1(b), Act of September 25, 1970, 84 Stat. 867)

EXPLANATORY NOTE

1970 Amendment. Section 1(b) of the Act of September 25, 1970 (Public Law 91-416, 84 Stat. 867) amended section 7 by deleting "$135,000,000 (June 1961 prices)" and substituting in lieu thereof "$206,000,000 (April 1970 prices)". The 1970 Act appears in Volume IV in chronological order.

NOTE OF OPINION

1. Project modifications

In lieu of the originally contemplated gravity irrigation system for Block I of the Navajo Indian Irrigation Project, the Commissioner of Reclamation is authorized to substitute a sprinkler irrigation system which will save water, be less expensive, more efficient, and, in general, be superior to the gravity system. Modifications in the original plan due to improvements in technology and farm-system operations are implicitly authorized by the Act so long as appropriations in excess of the authorized ceiling are not required, as such changes are designed to better realize Congressional intent. Memorandum of Associate Solicitor Robison to Commissioner of Reclamation, April 2, 1974.

1660-1662 NAVAJO AND SAN JUAN-CHAMA PROJECTS

Pages 1660-1662

Sec. 8. [Purposes—Compliance with Upper Colorado River Basin compact and Rio Grande compact—Minimum flow of Navajo River and Blanco River—Capacity for future diversion.]—

* * * * *

EXPLANATORY NOTE

Supplementary Provision: Elephant Butte Recreation Pool. Title XIV of the Reclamation Development Act of October 27, 1974 (Public Law 93-493, 88 Stat. 1486) authorizes the Secretary of the Interior to permit releases from the Heron Reservoir of the San Juan-Chama project to provide storage and establish a minimum recreation pool in Elephant Butte Reservoir, New Mexico. Such releases are limited to 50,000 acre-feet for the initial recreation pool, and 6,000 acre-feet annually for a period not exceeding ten years from the establishment of the pool to replace losses by evaporation and other causes. The Act 1974 appears in Volume IV in chronological order.

NOTES OF OPINIONS

Authorized project purposes, priorities 2
Limitations on storage 3
NEPA compliance 4
State law 5

2. Authorized project purposes, priorities

The fact that the Act of March 26, 1964 authorized permanent storage at Cochiti Reservoir of 50,000 acre feet of San Juan-Chama water, plus annual additions sufficient to offset evaporation, for recreation and fish and wildlife purposes, combined with the fact that section 1401 of the Reclamation Development Act of 1974 authorizes the release of water from Heron Reservoir to provide up to 50,000 acre feet plus evaporation loss annually to Elephant Butte for a recreation pool, does not demonstrate that storage at Elephant Butte is prohibited absent express Congressional authorization. Storage at Elephant Butte for purposes which are Congressionally authorized and which constitute beneficial uses under State law would not violate the provisions of the Colorado River Storage Project Act and the Act of June 13, 1962. Rather, the Act of March 26, 1964 and section 1401 of the Reclamation Development Act were passed in order to provide authorization because water was to be released without a contract as required by section 11 of the Act of June 13, 1962 and to be used solely for recreational purposes. It cannot be inferred from these statutes that water received by contract purchasers is not to be stored at Elephant Butte for municipal, industrial, or irrigation purposes. *Jicarilla Apache Tribe v. United States,* 657 F.2d 1126 (10th Cir. 1981).

The legislative history of the Act of June 13, 1962 demonstrates that Congress recognized the critical shortage of water in the Rio Grande Basin and that the language in sections 1 and 8 of that Act was deliberately intended to make recreation and fish and wildlife benefits incidental to municipal, industrial, and agricultural water use. Thus, the Act and its history fail to support a finding that water for recreation and fish and wildlife purposes was not directly allocated by the Act solely to limit Federal expenditures because, under section 8 of the Colorado River Storage Project Act, such allocations would make a proportionate share of such project costs nonreimbursable, while the expense of water allocated to municipal water supply must be recovered under section 6 of that Act. *Jicarilla Apache Tribe v. United States,* 657 F.2d 1126 (10th Cir. 1981).

It is clear from sections 1 and 8 of the Colorado River Storage Project Act and sections 1 and 8 of the Act of June 13, 1962 that the principal uses for San Juan-Chama Project water are for irrigation, municipal, industrial, and domestic purposes, and all other uses, including recreation and fish and wildlife, are merely incidental. Thus, the storage in the Elephant Butte Reservoir of water purchased by Albuquerque from the Heron Reservoir is prohibited where the sole purpose is for recreational use, even assuming such storage would be permitted under the law of New Mexico. *Jicarilla Apache Tribe v. United States,* 657 F.2d 1126 (10th Cir. 1981).

Assuming that the Federal Water Project

Recreation Act, which authorizes consideration of opportunities for recreation and wildlife enhancement, applies to San Juan-Chama Project water, nothing in the statute authorizes storage solely for recreational purposes. The statute does not suggest that the specific limitations of the Colorado River Storage Project Act and the Act of June 13, 1962, which make recreational use only incidental to irrigation, municipal, and industrial use, should be ignored in favor of recreation or wildlife. *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126 (10th Cir. 1981).

Because Congress has used both the term "municipal" and the term "recreational" with regard to the purposes for which water from the San Juan-Chama Project may be used, and as these terms have distinct meanings, the mere fact that excess water is to be stored at the Elephant Butte Reservoir for recreational purposes by the City of Albuquerque does not transform a recreational use into a municipal use. Since, under the Colorado River Storage Project Act, recreation use is only incidental to municipal use, recreation, whether provided by Albuquerque or otherwise, could not justifiably constitute the only use of a large amount of San Juan-Chama water. *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126 (10th Cir. 1981).

Nothing in section 301(b) of the Water Supply Act of 1958 suggests that a municipality such as the City of Albuquerque may place, solely for recreational purposes, the excess water it receives from the Heron Reservoir, San Juan-Chama Project, into storage in the Elephant Butte Reservoir. Even if the statute is read to permit storage by a municipality for any purpose, the specific terms and conditions of the Colorado River Storage Project Act and the Act of June 13, 1962, which make recreational use only incidental to the primary purposes of municipal, industrial, and irrigation uses, override conflicting authority in section 301(b). *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126 (10th Cir. 1981).

3. Limitations on storage

The limitations on storage of water from the San Juan River imposed by the proviso of section 2 of the Colorado River Storage Project Act does not prohibit storage of San Juan-Chama project water anywhere besides Heron Reservoir. The studies preceding authorization of the project demonstrate that the purpose of this proviso was to prevent commingling of San Juan-Chama and Rio Grande Basin waters and to permit accurate measurement of the quantity of imported water. Moreover, section 8 of the Act of June 13, 1962 suggests that, in addition to the storage and regulation facility at Heron Reservoir, water use facilities were contemplated, including reservoirs and dams. *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126 (10th Cir. 1981).

4. NEPA compliance

An environmental impact statement is not required for the construction of a fence on the boundary line of 6,816.5 acres of land condemned by the United States as part of the Heron Reservoir, San Juan-Chama Project, as 1) the entire project, including the fencing, was planned and scheduled long before January 1, 1970, the date the National Environmental Policy Act became effective, 2) it is unreasonable to assume that Congress would intend that the Government, having acquired fee simple title to this land for the purpose of constructing a reservoir and for the additional purpose of protecting wildlife, would now be required to have an environmental study made on a relatively small part of the entire project—the fencing of the boundary lines—and 3) the evidence indicates that the creation of the fence will enhance rather than detract from proper environmental control of the area. *Maddox v. Bradley*, 345 F. Supp. 1255 (N.D. Tex. 1972).

5. State law

Because section 8 of the Reclamation Act mandates that State law generally govern the distribution and use of water after release from a Federal Reclamation project and this same section further provides that "beneficial use shall be the basis, the measure and the limit" of rights to the use of water from Reclamation projects, it is clear that the Secretary of the Interior may not knowingly release water to an individual or entity for a use which is not recognized as beneficial under State law unless such use is specifically authorized by a Congressional directive. Similarly, no one is entitled to receive water for a use not recognized as beneficial under State law. Thus, Albuquerque is prohibited from running excess water it has contracted to purchase from the Heron Reservoir, San Juan-Chama Project, to the Elephant Butte Reservoir for storage as such action would result in the loss of 93% of the stored water to evaporation and therefore could not be considered a beneficial use under New Mexico law. *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126 (10th Cir. 1981).

1663-1664 NAVAJO AND SAN JUAN-CHAMA PROJECTS

Pages 1663-1664

Sec. 11. [Contracts to provide apportionment in event of shortages—Determination of sufficient water for use in New Mexico.]—

* * * * *

EXPLANATORY NOTES

Supplementary Provisions: Storage of Project Water. Section 5 of the Act of December 29, 1981 (Public Law 97-140, 95 Stat. 1717): authorized agreements with entities contracting for San Juan-Chama Project water pursuant to this Act by the Secretary of the Army, and the Secretary of the Interior, for storage of such water in Abiquiu Reservoir, and Elephant Butte Reservoir, respectively; authorized the Secretary of the Interior to release Project water to contracting entities for such storage; provided for payment of increased operation and maintenance costs attributable to such storage; and required evaporation loss and spill chargeable to such storage to be accounted for as required by the Rio Grande Compact. The 1981 Act also provided that the proviso in section 2 of Public Law 87-485 (Act of April 11, 1956, 70 Stat. 105, authorizing the Colorado River Storage Project) shall not be construed to prohibit storage of San Juan-Chama Project water acquired by contract under this Act in any reservoir, including storage of water for recreation and other beneficial purposes by any contracting party. The 1981 Act appears in Volume IV in chronological order.

Supplementary Provision: Elephant Butte Recreation Pool. Title XIV of the Reclamation Development Act of October 27, 1974 (Public Law 93-493, 88 Stat. 1486) authorizes the Secretary of the Interior to permit releases from the Heron Reservoir of the San Juan-Chama project to provide storage and establish a minimum recreation pool in Elephant Butte Reservoir, New Mexico. The provisions of section 11(a) requiring a contract satisfactory to the Secretary for the use of any water of the San Juan River are expressly waived with respect to the use of water to establish and maintain the pool, provided that such use of water is not detrimental to any Indian water rights. The 1974 Act appears in Volume IV in chronological order.

Error in the Text of Volume III. The title of the U.S. Code was inadvertently omitted from the citation at the end of section 11(c). The number "43" should be inserted preceding "U.S.C.".

NOTES OF OPINIONS

Irrigation principal project purpose 1
Sprinkler, in lieu of gravity, irrigation 2
Use of water without contract 3

1. Irrigation principal project purpose

The Secretary has no authority, even with the consent of the Navajo Indians, to contract for the delivery of any amount of water from the Navajo Reservoir which would impair the availability of water for the irrigation of 110,630 acres of Navajo Indian land because (1) section 2 of the Navajo Indian Irrigation Project Act expressly provides that the principal purpose of the project is to furnish irrigation water to the Indian land, (2) section 4 of the Act authorizes capacity for water for municipal and industrial and miscellaneous uses only to the extent such water exceeds the diversion requirements for irrigation of the 110,630 acres of land, and (3) section 11(a) prohibits the Secretary from entering into contracts that would result in less than a reasonable amount of water, in the event of a shortage, being available for diversion requirements of the Navajo Irrigation Project. Letter of Assistant Secretary Holum to Senator Clinton P. Anderson, October 24, 1967, answering questions on certain proposed contracts for the delivery of water from the Navajo Reservoir.

2. Sprinkler, in lieu of gravity, irrigation

Where depletion for the Navajo Indian Irrigation Project was initially estimated at 254,000 acre feet of water annually, based on gravity irrigation, and the use of sprinkler irrigation reduced the depletion by 24,000 acre feet, it is equitable that such residual depletion should be available for other beneficial uses within the Navajo Reservation, provided that such uses be covered by appropriate contractual arrangements, as required by this section. Memorandum from Acting Commissioner of Reclamation to Associate Solicitor, Energy and Resources, May 7, 1974, as amended by Memorandum of Solicitor Frizzell to Under Secretary, May 17, 1974.

3. Use of water without contract

The fact that the Act of March 26, 1964 authorized permanent storage at Cochiti Reservoir of 50,000 acre feet of San Juan-Chama water, plus annual additions sufficient to offset evaporation, for recreation and fish and wildlife purposes, combined with the fact that section 1401 of the Reclamation Development Act of 1974 authorizes the release of water from Heron Reservoir to provide up to 50,000 acre feet plus evaporation loss annually to Elephant Butte for a recreation pool, does not demonstrate that storage at Elephant Butte is prohibited absent express Congressional authorization. Storage at Elephant Butte for purposes which are Congressionally authorized and which constitute beneficial uses under State law would not violate the provisions of the Colorado River Storage Project Act and the Act of June 13, 1962. Rather, the Act of March 26, 1964 and section 1401 of the Reclamation Development Act were passed in order to provide authorization because water was to be released without a contract as required by section 11 of the Act of June 13, 1962 and to be used solely for recreational purposes. It cannot be inferred from these statutes that water received by contract purchasers is not to be stored at Elephant Butte for municipal, industrial, or irrigation purposes. *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126 (10th Cir. 1981).

MANN CREEK PROJECT

Pages 1668-1669

EXPLANATORY NOTE

Codification Omitted. The Act of August 16, 1962 (Public Law 87-589, 76 Stat. 388), authorizing the Mann Creek Project, originally was codified at 43 U.S.C. §§ 616g to 616j but was omitted from the 1976 and subsequent editions of the U.S. Code as having limited applicability.

FRYINGPAN–ARKANSAS PROJECT

Pages 1670-1671

[Sec. 1. (a) Fryingpan-Arkansas project authorized—Not to include Gunnison-Arkansas project—Limitations on use of Colorado River water.]—For the purposes of supplying water for irrigation, municipal, domestic, and industrial uses, generating and transmitting hydroelectric power and energy, and controlling floods, and for other useful and beneficial purposes incidental thereto, including recreation and the conservation and development of fish and wildlife, the Secretary of the Interior is authorized to construct, operate, and maintain the Fryingpan-Arkansas project, Colorado, in substantial accordance with the engineering plans therefor set forth in House Document Numbered 187, Eighty-third Congress, modified as proposed in the September 1959 report of the Bureau of Reclamation entitled "Ruedi Dam and Reservoir, Colorado", and as further modified and described in the description of the proposal contained in the final environmental statement for said project, dated April 16, 1975, with such minor modifications of, omissions from, or additions to the works described in those reports as he may find necessary or proper for accomplishing the objectives of the project. Such modifications or additions as may be required in connection therewith shall not, however, extend to or contemplate the so-called Gunnison-Arkansas project; and nothing in this Act shall constitute a commitment, real or implied, to exportations of water from the Colorado River system in Colorado beyond those required for projects heretofore or herein authorized. In constructing, operating, and maintaining the Fryingpan-Arkansas project, the Secretary shall be governed by the Federal reclamation laws (Act of June 17, 1902; 32 Stat. 388, and Acts amendatory thereof or supplementary thereto). (76 Stat. 389; Act of November 3, 1978, 92 Stat. 2493)

EXPLANATORY NOTES

Codification Omitted. The Act of August 16, 1962 (Public Law 87-590, 76 Stat. 389), authorizing the Fryingpan-Arkansas Project, originally was codified at 43 U.S.C. §§ 616-616f but was omitted from the 1976 and subsequent editions of the U.S. Code as having limited applicability.

1978 Amendment. Title IX of the Act of November 3, 1978 (Public Law 95-586, 92 Stat. 2493) amended subsection (a) of section 1 by inserting "and as further modified and described in the description of the proposal contained in the final environmental statement for said project, dated April 16, 1975," following " 'Ruedi Dam and Reservoir, Colorado',". The 1978 Act appears in Volume IV in chronological order.

NOTE OF OPINION

1. Hunter Creek diversion

Because of apparent inconsistencies between the feasibility report contained in House Document No. 187 and the Operating Principles contained in the same document with regard to the diversion of water from the South Forks of Hunter Creek for exchange with the Twin Lakes Canal and Reservoir Company, the Bureau of Reclamation may not operate the Fryingpan-Arkansas Project under revised plans calling for diversions from the South Forks in excess of 3000 acre-feet of water annually, or use such diverted water for purposes other than the proposed exchange, until such time as additional clarifying authority to so operate the project is obtained from Congress. Solicitor Krulitz Opinion, M-36902, 85 I.D. 326 (July 31, 1978).

Page 1671

Sec. 2. [Repayment period for irrigation water users; no development period authorized—Rates to be charged for commercial power and water for municipal, domestic, or industrial use—Interest rates.]—

* * * * *

NOTES OF OPINION

1. Water rates

Under paragraphs 3 and 6(b) of the operating principles of the State of Colorado, in establishing charges for the sale of water from the Ruedi Reservoir the Secretary should set rates which would result only in repayment of the operation and maintenance costs and those reimbursable construction costs of the reservoir which exceed $7,600,000, notwithstanding the provision in section 2(b) of the Act for repayment of so much of the irrigation allocation which is beyond the ability of water users to repay. The incorporation by reference (in section 3 of the Act) of the operating principles into the authorizing statute evidences Congressional intent that the specific requirements of the principles should prevail over the more general language of the project Act. Memorandum of Assistant Solicitor Mauro to Regional Solicitor, Rocky Mountain Region, March 20, 1981, in re proposed sale of water, Fryingpan-Arkansas Project.

Rates for the sale of regulatory water supply from Ruedi Reservoir may be established pursuant to section 301(b) of the Water Supply Act of 1958 rather than section 9(c)(2) of the Reclamation Project Act of 1939 as, at the time construction was authorized, Congress was notified that repayment of municipal and industrial costs would be governed by the Water Supply Act, interest on water supply had already been deferred for ten years, and the language of the Water Supply Act specifies that its provisions are available as an alternative to those of the 1939 Act. Memorandum of Assistant Solicitor Mauro to Regional Solicitor, Rocky Mountain Region, March 20, 1981, in re proposed sale of water, Fryingpan-Arkansas Project.

Pages 1671-1672

Sec. 3. [Operating principles—Benefits and rights of western Colorado water users—Interbasin transfers of water—Diversions from Hunter Creek.]—(a) The Fryingpan-Arkansas project shall be operated under the direction of the Secretary in accordance with the operating principles adopted by the State of Colorado on December 9, 1960, and reproduced in House Document Numbered 130, Eighty-seventh Congress; and shall be further operated pursuant to diversion rates established under the laws of the State of Colorado: *Provided*, That the rate of project diversions from the Hunter Creek watershed shall not exceed an aggregate of 270 cubic feet of water per second of time. Waters so diverted may be utilized for all authorized project purposes as set forth in section 1(a) of this Act. Such waters, exclusive of the amount diverted for Roaring Fork exchanges provided for in subparagraph 9(1)(c) and paragraph 11 of the above referenced operating principles shall become part of the project water supply as limited by subparagraph 9(1)(a) of the above referenced operating principles. No diversions shall be made from the Hunter Creek watershed which will reduce the remaining streamflows at the points of diversion to less than 4 cubic feet per second on No Name Creek, 5 cubic feet per second on Midway Creek, and 12 cubic feet per second on Hunter Creek.

* * * * *

(76 Stat. 391; Act of November 3, 1978, 92 Stat. 2493)

EXPLANATORY NOTE

1978 Amendment. Title IX of the Act of November 3, 1978 (Public Law 95–586, 92 Stat. 2493) amended subsection (a) of section 3 by inserting the language that appears above following "Congress;". The 1978 Act appears in Volume IV in chronological order.

NOTE OF OPINION

1. Hunter Creek Diversion

Because of apparent inconsistencies between the feasibility report contained in House Document No. 187 and the Operating Principles contained in the same document with regard to the diversion of water from the South Forks of Hunter Creek for exchange with the Twin Lakes Canal and Reservoir Company, the Bureau of Reclamation may not operate the Fryingpan-Arkansas Project under revised plans calling for diversions from the South Forks in excess of 3000 acre-feet of water annually, or use such diverted water for purposes other than the proposed exchange, until such time as additional clarifying authority to so operate the project is obtained from Congress. Solicitor Krulitz Opinion, M-36902, 85 I.D. 326 (July 31, 1978).

Pages 1673-1674

Sec. 5. [Statutes governing diversion of Colorado River water—Use of diverted water limited to State of Colorado—Arkansas River compact obligations unchanged—Right or claim of right to Colorado River water not aided or abetted—Compliance with compacts and Federal and State laws—Consent to suit against, or joinder of, the United States.]—

* * * * *

(e) In the operation and maintenance of all facilities under the jurisdiction and supervision of the Secretary of the Interior authorized by this Act, the Secretary of the Interior is directed to comply with the applicable provisions of the Colorado River compact, the Upper Colorado River Basin compact, the Boulder Canyon Project Act, the Boulder Canyon Project Adjustment Act, the Colorado River Storage Project Act (and any contract lawfully entered into by the United States under any of said Acts), the treaty with the United Mexican States, and the operating principles, and to comply with the laws of the State of Colorado relating to the control, appropriation, use, and distribution of water therein, including those laws of the State of Colorado relating to the establishment of minimum streamflows for the reasonable protection of the natural environment, to the extent that such laws are not inconsistent with the operating principles identified in subsection 3(a) of this Act. In the event of the failure of the Secretary of the Interior to so comply, any State of the Colorado River Basin may maintain any action in the Supreme Court of the United States to enforce the provisions of this section and consent is given to the joinder of the United States as a party in such suit or suits, as a defendant or otherwise. (76 Stat. 392; Act of November 3, 1978, 92 Stat. 2493)

EXPLANATORY NOTES

1978 Amendment. Title IX of the Act of November 3, 1978 (Public Law 95-586; 92 Stat. 2493) amended subsection (e) of section 5 by inserting the language that completes the sentence following "therein." The 1978 Act appears in Volume IV in chronological order.

Pages 1674-1675

Sec. 7. [Appropriation authorizations.]—There is hereby authorized to be appropriated for construction of the Fryingpan-Arkansas project, the sum of $432,000,000 (January 1974 price levels), plus or minus such amounts, if any, as may be justified by reason of ordinary fluctuations in construction costs as indicated by engineering cost indexes applicable to the types of construction involved herein. There are also authorized to be appropriated such additional sums as may be required for operation and maintenance of the project and for future costs incurred under section 4 of this Act. (76 Stat. 393; § 1101, Act of October 27, 1974, 88 Stat. 1497)

EXPLANATORY NOTES

1974 Amendment. Section 1101 of the Reclamation Development Act of October 27, 1974 (Public Law 93-493, 88 Stat. 1486) amended section 7 by increasing the appropriation authorization from $170,000,000 (June 1961 prices) to $432,000,000 (January 1974 price levels). The 1974 Act appears in Volume IV in chronological order.

ARBUCKLE PROJECT

Page 1676

[Sec. 1. Arbuckle project authorized.]

* * * * *

EXPLANATORY NOTE

Codification Omitted. The Act of August 24, 1962 (Public Law 87-594, 76 Stat. 395), authorizing the Arbuckle Project, originally was codified at 43 U.S.C. §§ 616k to 616s but was omitted from the 1976 and subsequent editions of the U.S. Code as having limited applicability.

NOTE OF OPINION

1. Determination of "minimum basic recreational facilities"

Where the Act of August 24, 1962 authorized the Secretary of the Interior to include in the Arbuckle Project "minimum basic recreational facilities," landowners cannot challenge governmental condemnation of their land for recreational purposes merely because their property does not lie within the area proposed to be taken for these purposes in the project feasibility report. The Act did not attempt to define "minimum basic recreational facilities" but left such determination to the Secretary limited only by the overall funds appropriated. The feasibility report was not incorporated into the Act and where, as here, the Act is clear and unambiguous, it is inappropriate to use the report or any other part of the legislative history to arrive at an interpretation of the meaning of the Act. *Thetford v. United States*. 404 F.2d 301 (10th Cir. 1968).

Pages 1677-1678

Sec. 6. [Recreational facilities authorized consistent with State fish and game and health and welfare laws—Federal costs.]—

* * * * *

NOTE OF OPINION

1. Determination of "minimum basic recreational facilities"

Where the Act of August 24, 1962 authorized the Secretary of the Interior to include in the Arbuckle Project "minimum basic recreational facilities," landowners cannot challenge governmental condemnation of their land for recreational purposes merely because their property does not lie within the area proposed to be taken for these purposes in the project feasibility report. The Act did not attempt to define "minimum basic recreational facilities" but left such determination to the Secretary limited only by the overall funds appropriated. The feasibility report was not incorporated into the Act and where, as here, the Act is clear and unambiguous, it is inappropriate to use the report or any other part of the legislative history to arrive at an interpretation of the meaning of the Act. *Thetford v. United States*, 404 F.2d 301 (10th Cir. 1968).

UPPER DIVISION, BAKER PROJECT

Pages 1687-1688

EXPLANATORY NOTE

Codification Omitted. The Act of September 27, 1962 (Public Law 87-706, 76 Stat. 634), authorizing the Upper Division of the Baker Project, originally was codified at 43 U.S.C. §§ 616t to 616w but was omitted from the 1976 and subsequent editions of the U.S. Code as having limited applicability.

AMENDED CONTRACTS AND REPEAL OF FARM UNIT LIMITATIONS, COLUMBIA BASIN PROJECT

Pages 1691-1692

Sec. 3. [Columbia Basin Project to be governed by Federal Reclamation laws—Sections of Columbia Basin Project Act repealed—Section 4 of same amended.]—

*   *   *   *   *

NOTES OF OPINIONS

1. Excess lands

After passage of the Act of October 1, 1962 (Public Law 87–728) the holder of excess lands on the Columbia Basin Project must sell those lands at a price approved by the Secretary of the Interior, until one-half of the construction charges are paid, if the land is to receive project water after the sale. The fact that the lands were subject to a recordable contract, executed under section 2 of the Act of March 19, 1943 (57 Stat. 14) eliminating the price-approval requirement five years after notice of availability of project water, did not give the landowner a vested right against extension of the price-approval requirement thereafter. *Israel v. Morton*, 549 F.2d 128 (9th Cir. 1977).

The United States District Court may entertain an action by the State of Washington alleging that government officials violated the Federal Reclamation laws by refusing to deliver project water to more than 160 acres of State school lands, where the amount in controversy is less than $10,000. *State of Washington v. Udall*, 417 F.2d 1310 (9th Cir. 1969).

CONVEYANCE OF LAND TO CITY OF NEEDLES

Page 1693

[Sec. 1. Conveyance of land to City of Needles, Calif.—Legal description of the land.]—The Secretary of the Interior shall issue to the city of Needles, in the county of San Bernardino, State of California, upon payment by the city into the Treasury of the United States, not more than five years after the Secretary has notified the city of the purchase price which shall be an amount equal to the fair market value plus the cost of any appraisal of the lands as of the effective date of this Act as determined by the Secretary after the appraisal of the lands by contract appraisal or otherwise, a patent or deed for the following described lands situated within the city limits of said city of Needles or adjacent thereto, in the State of California comprising a total of 340 acres more or less (all range references are to San Bernardino base and meridian):

* * * * *

(Legal description omitted, 76 Stat. 749)

* * * * *

Explanatory Note

1967 Amendment. The Act of November 15, 1967 (Public Law 90–138, 81 Stat. 463) amended section 1 by deleting the words "with a reservation to the United States of the coal, phosphate, sodium, potassium, oil, gas, oil shale, native asphalt, solid and semisolid bitumen and bituminous rock (including oil-impregnated rock or sands from which oil is recoverable only by special treatment after the deposit is mined or quarried), together with the right to prospect for, mine, and remove the same under applicable provisions of law" which appeared after the words "(all range references are to San Bernardino base and meridian)". The 1967 Act appears in Volume IV in chronological order.

EASEMENTS IN PROPERTY OF UNITED STATES

Pages 1699-1700

EXPLANATORY NOTE

Limited Repeal. Section 706(a) of the Federal Land Policy and Management Act of 1976 (Act of October 21, 1976, Public Law 94-579, 90 Stat. 2793) repealed this Act insofar as it applies to the issuance of rights-of-way over, upon, under, and through the public lands and lands in the National Forest System. Extracts from the 1976 Act, including section 706(a), appear in Volume IV in chronological order.

FLOOD CONTROL ACT OF 1962

Pages 1701-1703

Sec. 203. [Authorization of projects.]—

* * * * *

SAN JOAQUIN RIVER BASIN

[New Melones.]—

* * * * *

[Hidden Reservoir.]—

* * * * *

EXPLANATORY NOTE

Cross Reference, Hensley Lake. The Act of January 2, 1975 (Public Law 93–603, 88 Stat. 1959) designated the lake created by the Hidden Reservoir project as Hensley Lake. The 1975 Act appears in Volume IV in chronological order.

NOTES OF OPINIONS

- **Conditions imposed by State water right permit 1-10**
  - **Beneficial use 2**
  - **County of origin preference and water quality control 3**
  - **Generally 1**
  - **Power generation 4**
  - **Storage for out-of-basin use 5**
- **NEPA compliance 11-20**
  - **Adequacy of environmental impact statement 11**
  - **Supplemental environmental impact statement 12**
  - **Scope of study 13**
- **Service area 21**

1. Conditions imposed by State water right permit—Generally

Notwithstanding previous dictum to the contrary, section 8 of the Reclamation Act authorizes a State to impose conditions on the control, appropriation, use or distribution of water through a Federal Reclamation project so long as such conditions are not inconsistent with Congressional directives regarding the project. The legislative history of the Reclamation Act of 1902 makes it abundantly clear that Congress intended to defer to the substance, as well as the form of State water law. Consequently, in order to impound unappropriated water by means of the New Melones Dam, Central Valley Project, and later use such water for reclamation, the United States must, in accordance with State law, first apply to the California State Water Resources Control Board for a permit and must comply with such conditions as the Board may impose so long as they are not inconsistent with Congressional directives. *California v. United States,* 438 U.S. 645 (1978), reversing *United States v. California,* 558 F. 2d 1347 (9th Cir. 1977), which had affirmed in part 403 F. Supp. 874 (E.D. Cal. 1975).

In light of the Supreme Court's ruling that under section 8 of the Reclamation Act of 1902 any conditions imposed by the State of California as part of the water right permit issued for the New Melones project are valid as long as the condition actually imposed is not inconsistent with Congressional directives as to the project, *California v. United States,* 438 U.S. 645 (1978), and the failure or refusal of the United States on remand to present any evidence of impracticality or harmful consequences from any specific condition, nothing is found in those conditions that could not be in harmony with the letter and spirit of the 1962 statute authorizing the project. Thus the "hard-line" position of the United States that since it built the dam it need not justify its operational plans so long as those plans are consistent with the scope of the project as envisioned by Congress is rejected and the United States is not entitled at this time and on that record to have any of the conditions invalidated. *United States v. California*, 694 F.2d 1171 (9th Cir. 1982), reversing in part 509 F. Supp. 867 (E.D. Cal. 1981).

Once the Federal government has made binding contracts for delivery of water from the New Melones project, California would be more restricted than it was when it originally regulated impoundment and distribution of water. The Supreme Court, in *California v. United States*, 438 U.S. 645 (1978), did not mention State control over the actual operation of the dam, as contrasted with impoundment and distribution of water, as one of the purposes intended by Congress under section 8 of the Reclamation Act of 1902. State law, where not inconsistent with Federal law, was to control only the impoundment of water into the dam and the distribution of water from the dam to individual landowners. It is doubtful that the Court intended California to play a significant role in influencing the later operation of the dam. *United States v. California*, 694 F.2d 1171 (9th Cir. 1982).

2.—Beneficial use

Inasmuch as California law requires that water be appropriated only for beneficial use, section 8 of the Reclamation Act of 1902 mandates that the "beneficial use" standard be met by uses of water in Federal Reclamation projects, and the United States made no attempt on remand to demonstrate that water made available for consumptive purposes would be put to beneficial use or to argue that such a demonstration was impossible or even difficult, the condition imposed by California as part of the water right permit issued for the New Melones project providing that no impoundment of water for consumptive uses would be allowed until further showings have been made concerning firm commitments to deliver water for such uses and the benefits to be derived therefrom is not inconsistent with Congressional directives as to the project and is therefore not invalid. *United States v. California*, 694 F.2d 1171 (9th Cir. 1982).

3.—County of origin preference and water quality control

Where the statute authorizing the New Melones project provided that out-of-basin diversions should be subordinate to in-basin needs and that consideration should be given to including storage for regulation of streamflow for water quality control, conditions imposed by California as part of a water right permit requiring the project to abide by the county of origin preference of State law and to serve the State's water quality goals did not work against Congressional purposes but led to results anticipated and apparently encouraged by Congress and, inasmuch as the United States did not show (or argue) that their implementation would frustrate the attainment of any Federal goal, the conditions are upheld. The fact that Congress may have intended to have such decisions made by Federal agencies, rather than State government, does not render the conditions invalid. While a State cannot require an action solely because a Federal agency, on its own initiative, could have decided to do it, in the face of section 8 of the Reclamation Act of 1902, Congress' mere direction to operate the project is not a directive permitting Federal agencies to ignore State law in the impoundment and distribution of water. *United States v. California*, 694 F.2d 1171 (9th Cir. 1982), affirming 509 F. Supp. 867 (E.D. Cal. 1981).

4.—Power generation

Where the facts did not demonstrate a Congressional intent to require the dam to be used immediately for power generation purposes, the United States did not demonstrate a need to impound water for power purposes only, and there was no basis for holding that full use of the project for power purposes will not be made in due course or that interim deferment of full impoundment will adversely affect project feasibility, the condition imposed by California as part of the water right permit issued for the New Melones project prohibiting additional impoundment for power purposes is not invalid. *United States v. California*, 694 F.2d 1171 (9th Cir. 1982), reversing 509 F. Supp. 867 (E.D. Cal. 1981).

5.—Storage for out-of-basin use

Although it is clear that surplus water from the New Melones Project is ultimately to be delivered to areas outside the local basin area (consisting of Tuolumne, Calaveras, San Joaquin and Stanislaus Counties) but within the Central Valley Project, nothing in the Flood

Control Act of 1962 authorizing the New Melones Project or its history indicates that Congress intended such surplus water to be impounded and held behind the New Melones Reservoir until its beneficial use in outside areas could be implemented. Hence, the California State Water Resources Control Board could limit water to be appropriated for consumptive use to the amount to be used for this purpose within the local basin area where the Bureau of Reclamation, as yet, had not even taken under consideration any applications for delivery of project water for consumptive use outside the local service area and the proposed storage would adversely affect whitewater boating, stream fishing, and wildlife habitat on the Stanislaus River. *United States v. California*, 509 F. Supp. 867 (E.D. Cal. 1981).

11. NEPA compliance—Adequacy of environmental impact statement

The environmental impact statement filed for the New Melones Dam satisfied the requirement of section 102(2)(C)(iii) of the National Environmental Policy Act that it contain a detailed statement of all reasonable structural and nonstructural alternatives to the proposed dam by considering such alternatives as: possible alternative reservoir sizes, including increasing the size of the downstream Tulloch Dam; alternative reservoir sizes at the New Melones site; alternatives to the planned operation, such as releases downstream to enhance fisheries and water quality and to meet the demands of other nearby service areas; and alternatives to constructing the reservoir itself, such as channel and levee improvements, floodplain management and abandonment of the project. The Act requires only that all reasonable alternatives to the project be considered, even if some were only briefly alluded to or mentioned. *Environmental Defense Fund, Inc. v. Armstrong*, 352 F. Supp. 50 (N.D. Cal. 1972) and 356 F. Supp. 131 (N.D. Cal. 1973), aff'd, 487 F.2d 814 (9th Cir. 1973), cert. denied, 416 U.S. 974 (1974).

The supplementary environmental impact statement which addressed the possible uses for the conservation yield of the New Melones Dam is not deficient because it failed to assign priorities of need for water among service areas that may potentially use New Melones water because: (1) as a practical matter, it is impossible to assign such priorities at present, inasmuch as no diversion of water will occur for at least eight years; (2) the authoring statute (the Flood Control Act of 1962) itself establishes definite priorities; and (3) the District Court has explicitly retained jurisdiction over the case to insure that data dealing with the operation of the dam is forthcoming in a future or supplemental environmental impact statement, well before the New Melones Dam actually becomes operational. *Environmental Defense Fund, Inc. v. Armstrong*, 356 F. Supp. 131 (N.D. Cal. 1973), aff'd, 487 F.2d 814 (9th Cir. 1973), cert. denied,416 U.S. 974 (1974).

It is not inappropriate for the Government to employ a 3½% discount rate in the environmental impact statement for the New Melones Dam even though such rate was, arguably, economically unrealistic at the time the statement was filed, as this is the rate Congress has expressly authorized to be used in evaluating Government projects. *Environmental Defense Fund, Inc. v. Armstrong*, 352 F. Supp. 50 (N.D. Cal. 1972), aff'd, 487 F.2d 814 (9th Cir. 1973), cert. denied, 416 U.S. 974 (1974).

12.—Supplemental environmental impact statement required

Where the ultimate operation of a project is still in doubt at the time the environmental impact statement required by section 102(2)(C) of the National Environmental Policy Act is filed, the initial environmental impact statement should be viewed as an interim statement, the first part of a two-step process whereby the responsible Federal officials would first give their best estimate of the uses to which the project will be put. Then, prior to actual use, a revised or supplemental statement should be filed either reaffirming those estimates or describing the newer proposed uses and their environmental impacts. Thus, where the initial environmental impact statement for the New Melones Dam failed to address the tentative alternative uses for, and the environmental impact of the 285,000 acre feet of conservation yield, the court may require the filing of a supplemental impact statement to discuss these issues, notwithstanding the Government's proposal to file a separate environmental impact statement at a point nearer in time to the dam's actual operation, some years in the future. *Environmental Defense Fund, Inc., v. Armstrong*, 352 F. Supp. 50 (N.D. Cal. 1972), aff'd 487, F.2d 814 (9th Cir. 1973), cert. denied, 416 U.S. 974 (1974).

13.—Scope of study

The National Environmental Policy Act

does not require that the environmental impact statement for the New Melones Project be delayed until a comprehensive study of the Central Valley Project, viewing the system of State and Federal water projects as an integrated unit, be made. So long as each major Federal action is undertaken individually and not as an indivisible, integral part of an integrated State-wide system, then the requirements of the Act are determined on an individual major Federal action basis. *Environmental Defense Fund, Inc. v. Armstrong*, 356 F. Supp. 131 (N.D. Cal. 1973), aff'd, 487 F.2d 814 (9th Cir. 1973), cert denied, 416 U.S. 974 (1974).

21. Service area

In providing that diversions from the Stanislaus River Basin shall at all times be subordinate to the quantities of water required to satisfy all existing and anticipated needs, the Act does not prevent the Secretary from including within the boundaries of the Basin lands which are adjacent to but outside the hydrologic drainage basin, as the legislative history of the Act reveals that the very persons whom Congress intended to protect by the preference provision would be shut out if the boundaries of the Basin were so restricted. However, the area should not be so large as to render the priority for water users within the Basin of slight benefit. Memorandum of Assistant Solicitor London to Assistant Secretary, Land and Water Resources, December 13, 1974, in re New Melones Project, Central Valley Project, as supplemented by Memorandum of Solicitor Krulitz to Assistant Secretary, Land and Water Resources, May 17, 1978, in re service area designations, New Melones Unit.

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ROGUE RIVER BASIN

* * * * *

EXPLANATORY NOTE

Subsequent Modification. Section 89 of the Water Resources Development Act of 1974 (Act of March 7, 1974, Public Law 93-251, 88 Stat. 38) modified the Rogue River Basin Project to provide for the construction of the Applegate Lake Project, Oregon, prior to the signing of repayment contracts required by Reclamation law. Extracts from the 1974 Act, including section 89, appear in Volume IV in chronological order.

Page 1704

COOK INLET, ALASKA

[Bradley Lake project.]—

* * * * *

EXPLANATORY NOTE

Authorization Terminated. The authorization for the Bradley Lake project was terminated by section 140 of the Further Continuing Appropriations Act, 1983 (Act of December 21, 1982, Public Law 97-377, 96 Stat. 1916). Extracts from the 1982 Act, not including section 140, appear in Volume IV in chronological order.

Pages 1704-1705

Sec. 204. (a) [Crater-Long Lakes division of the Snettisham project, Alaska, authorized to be constructed by the Secretary of the Army and to be operated and maintained by the Secretary of Energy.]—

* * * * *

(b) [Marketing of electric power and energy—Basis for rate schedules—Amortization of the capital investment—Salisbury Ridge transmission line—Preference purchasers—Condition of contract with purchases for resale—Power revenues covered into Treasury as miscellaneous receipts.]—Electric power and energy generated at the division except that portion required in the operation of the division, shall be disposed of by the Secretary of the Interior in such a manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles. Rate schedules shall be drawn having regard to the recovery of the costs of producing and transmitting the power and energy, including the amortization of the capital investment over a reasonable period of years, with interest at the average rate (which rate shall be certified by the Secretary of the Treasury) paid by the United States on its marketable long-term securities outstanding on the date of this Act and adjusted to the nearest one-eighth of 1 per centum: *Provided*, That the Secretary of the Interior in determining reimbursable costs, shall not include the costs of replacing and relocating the original Salisbury Ridge section of the 138-kilovolt transmission line: *Provided further*, That the Secretary of the Army, acting through the Chief of Engineers, shall relocate such transmission lines, at an estimated cost of $5,641,000. In the sale of such power and energy, preference shall be given to Federal agencies, public bodies, and cooperatives. It shall be a condition of every contract made under this Act for the sale of power and energy that the purchaser, if it be a purchaser for resale, will deliver power and energy to Federal agencies or facilities thereof within its transmission area at a reasonable charge for the use of its transmission facilities. All receipts from the transmission and sale of electric power and energy generated at said division shall be covered into the Treasury of the United States to the credit of miscellaneous receipts (76 Stat. 1193; § 201 (a), Act of October 22, 1976, 90 Stat. 2944)

EXPLANATORY NOTES

1976 Amendment. Section 201(a) of the Water Resources Development Act of 1976 (Act of October 22, 1976, Public Law 94-587, 90 Stat. 2944) amended subsection (b) by adding the provisos at the end of the second sentence. Extracts from the 1976 Act, including section 201(a), appear in Volume IV in chronological order.

Subsequent Modification. Section 210(b) of the Water Resources Development Act of 1976 (Act of October 22, 1976, Public Law 94–587, 90 Stat. 2945) modified the Crater-Long Lakes division of the Snettisham project, authorized by subsection (a), by extending the repayment period to sixty years and providing a repayment formula. Extracts from the 1976 Act, including section 201(b), appear in Volume IV in chronological order.

Transfer of Functions. Section 302(a) of the the Department of Energy Organization Act of 1977 (Act of August 4, 1977, Public Law 95-91, 91 Stat. 578) transferred the functions of the Secretary of the Interior under this section to the Secretary of Energy. Extracts from the 1977 Act, including section 302(a), appear in Volume IV in chronological order.

NOTES OF OPINIONS

Investigations and studies 1
Rates 2

1. Investigations and studies

The provisions in the Act of August 9, 1955 (69 Stat. 618) limiting appropriations for water resources investigations in Alaska to

$250,000 per year, does not apply to general investigations and planning and resource studies of the Alaska Power Administration which are justified under other laws, such as the Eklutna Project authorization of July 31, 1950 (64 Stat. 382) as amended; the Snettisham project authorization in section 204 of the Flood Control Act of 1962 (76 Stat. 1193); section 5 of the Flood Control Act of 1944 (58 Stat. 890); and the Public Land Administration Act of 1961 (43 U.S.C. § 1362). Acting Solicitor Weinberg Opinion, M-36727, March 27, 1968.

2. Rates

The authority to establish rates on an interim basis is a necessary corollary of, and inherent in, the basic authority to set rates. Memorandum of General Counsel Coleman, October 14, 1978, in re proposed delegation to the Federal Energy Regulatory Commission of rate confirmation authority for the Department of Energy's power marketing agencies.

The establishment of a confirm and approve power regarding rates of the Western Area Power Administration, and rates of the Alaska Power Administration for the Snettisham project, constitutes an appropriate action by the Secretary of Energy to subdivide his basic rate-making function in a manner designed to encourage uniformity and objective decision-making regarding the rate-making for all the power marketing administrations. Memorandum of General Counsel Coleman, October 14, 1978, in re proposed delegation to the Federal Energy Regulatory Commission of rate confirmation authority for the Department of Energy's power marketing agencies.

It is well within the Secretary of Energy's broad discretion under the Department of Energy Organization Act to delegate to the Assistant Secretary the authority to confirm and approve rates on an interim basis and to delegate or assign to the Federal Energy Regulatory Commission the authority to confirm and approve rates on a final basis. Memorandum of General Counsel Coleman, October 14, 1978, in re proposed delegation to the Federal Energy Regulatory Commission of rate confirmation authority for the Department of Energy's power marketing agencies.

Pages 1705-1706

Sec. 208. Section 207 of the Flood Control Act of 1960 (74 Stat. 501) is hereby amended to read as follows:

* * * * *

"(c) **[Future water resources projects—Road replacement design standards—Higher standard of road construction authorized if difference is paid for by State or local government.]**—For water resources projects to be constructed in the future, when the taking by the Federal Government of an existing public road necessitates replacement, the substitute provided will, as nearly as practicable, serve in the same manner and reasonably as well as the existing road. The head of the agency concerned is authorized to construct such substitute roads to the design standards which the State or owning political division would use in constructing a new road under similar conditions of geography and under similar traffic loads (present and projected). In any case where a State or political subdivision thereof requests that such a substitute road be constructed to a higher standard than that provided for in the preceding provisions of this subsection, and pays, prior to commencement of such construction, the additional costs involved due to such higher standard, such agency head is authorized to construct such road to such higher standard. Federal costs under the provisions of this subsection shall be part of the nonreimbursable project costs." (76 Stat. 1196; § 13, Act of March 7, 1974, 88 Stat. 17; 33 U.S.C. § 701r-1).

1705-1706 FLOOD CONTROL ACT OF 1962

Explanatory Note

1974 Amendment. Section 13 of the Water Resources Development Act of 1974 (Act of March 7, 1974, Public Law 93-251, 88 Stat. 17) amended subsection 207(c) of the Flood Control Act of 1960, as amended in its entirety by section 208 of the Flood Control Act of 1962, by, in the second sentence, substituting "to the design standards which the State or owning political division would use in constructing a new road under similar conditions of geography and under similar traffic loads (present and projected)" for "to design standards comparable to those of the State, or, where applicable State standards do not exist, those of the owning political division in which the road is located, for roads of the same classification as the road being replaced" and by deleting the third sentence. Extracts from the 1974 Act, including section 13, appear in Volume IV in chronological order.

Note of Opinion

1. Design standards, traffic loads

Where construction of the Foresthill Bridge, Auburn-Folsom South Unit, Central Valley Project, was completed and the Bridge accepted into the county road system before this section was amended by section 13 of the Water Resources Development Act of 1974 to authorize consideration of projected, as well as existing, traffic loads in determining design standards, the Bureau of Reclamation lacked authority to expand the roadway of the Bridge from two to four lanes. Memorandum from Assistant Solicitor Mauro to Assistant Secretary, Land and Water Resources, April 17, 1980.

COORDINATION OF RECREATION PROGRAMS

Pages 1711-1712

Sec. 2. [Functions and activities of the Secretary of the Interior.]—

* * * * *

(f) RESEARCH AND EDUCATION.—(1) Sponsor, engage in, and assist in research relating to outdoor recreation, directly or by contract or cooperative agreements, and make payments for such purposes without regard to the limitations of section 3324(a) and (b) of title 31, United States Code, concerning advances of funds when he considers such action in the public interest, (2) undertake studies and assemble information concerning outdoor recreation, directly or by contract or cooperative agreement, and disseminate such information without regard to the provisions of section 3204 of title 39, United States Code, and (3) cooperate with educational institutions and others in order to assist in establishing education programs and activities and to encourage public use and benefits from outdoor recreation.

* * * * *

(77 Stat. 49; § 6(h), Act of August 12, 1970, 84 Stat. 776; 16 U.S.C. § 460*l*-1)

EXPLANATORY NOTES

1970 Amendment. Section 6(h) of the Act of August 12, 1970 (Public Law 91–375, 84 Stat. 776) amended subsection (f) by substituting "section 3204 of title 39" for "section 4154 of title 39". The 1970 Act does not appear herein.

Codification Change. Pursuant to section 4(b) of the Act of September 13, 1982 (Public Law 97–258, 96 Stat. 1067), "section 3324(a) and (b) of title 31" was substituted for "section 3648 of the Revised Statutes (31 U.S.C. 529)" in subsection (f). The 1982 Act does not appear herein.

Page 1712

Sec. 4. [Terms defined.]—As used in this Act, the term "United States" shall include the District of Columbia and the terms "United States" and "States" may, to the extent practicable, include the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands. (77 Stat. 60; § 608(c), Act of March 12, 1980, 94 Stat. 92; 16 U.S.C. § 460*l*-3)

EXPLANATORY NOTE

1980 Amendment. Section 608(c) of the Act of March 12, 1980 (Public Law 96-205, 94 Stat. 92) amended section 4 by adding "the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands". The 1980 Act does not appear herein.

RENEWAL OF WATER SUPPLY CONTRACTS

Page 1714

NOTE OF OPINION

1. Industrial purposes

By authorizing the Secretary of Interior to enter into contracts to supply project water for "municipal water supply or miscellaneous purposes," section 9(c) of the Reclamation Project Act of 1939 permits the sale of water for industrial purposes from the Yellowtail and Boysen Reservoirs of the Missouri River Basin. It is clear that section 1(b) of the Flood Control Act of 1944 approved the disposition of project water for industrial purposes. It is also evident that the phrase "municipal water supply or miscellaneous purposes" was intended to encompass industrial purposes, as 1) the Act of June 21, 1963 expressly authorizes the renewal of contracts previously made under the 1939 Act for "municipal, domestic or industrial" purposes, 2) both section 2(b) of the Act of February 25, 1956 and section 301 of the Water Supply Act of 1958 illustrate that Congress has long associated municipal use with industrial use, and 3) Congress has been made aware of the Secretary's actions in selling project water for industrial use under the authority of the 1939 Act and has not objected. *Environmental Defense Fund, Inc. v. Morton*, 420 F. Supp. 1037 (D. Mont. 1976), aff'd sub nom. *Environmental Defense Fund, Inc. v. Andrus*, 596 F.2d 848 (9th Cir. 1979).

ADDITIONAL AUTHORIZATION FOR CERTAIN RIVER BASINS

Page 1737

RED RIVER BASIN

[Waurika Dam.]—

* * * * *

Explanatory Note

Subsequent Modification. Section 139 of the Water Resources Development Act of 1976 (Act of October 22, 1976, Public Law 94-587, 90 Stat. 2917) modified the project for Waurika Dam and Reservoir on Beaver Creek, Oklahoma, to provide that the interest rate applicable to the repayment by non-Federal interests of the cost of the water conveyance facilities shall be the same as the interest rate established for repayment of the cost of municipal and industrial water supply storage in the reservoir. Extracts from the 1976 Act, not including section 139, appear in Volume IV in chronological order.

1744

PERMANENT POOL, COCHITI RESERVOIR

Page 1744

[Sec. 1. Permanent pool for Cochiti Reservoir, New Mexico—Water to be made available from San Juan-Chama project.]—

* * * * *

EXPLANATORY NOTE

Cross Reference, Elephant Butte Recreation Pool. Title XIV of the Reclamation Development Act of 1974 (Act of October 27, 1974, Public Law 93-493, 88 Stat. 1486) authorizes the Secretary of the Interior to permit releases from the Heron Reservoir of the San Juan-Chama project to provide storage and establish a minimum recreation pool in Elephant Butte Reservoir, New Mexico. Such releases are subordinate to the obligations established by this Act of filling and maintaining a pool in the Cochiti Reservoir. The 1974 Act appears in Volume IV in chronological order.

NOTE OF OPINION

1. Authorized purposes of storage

The fact that the Act of March 26, 1964 authorized permanent storage at Cochiti Reservoir of 50,000 acre feet of San Juan-Chama water, plus annual additions sufficient to offset evaporation, for recreation and fish and wildlife purposes, combined with the fact that section 1401 of the Reclamation Development Act of 1974 authorizes the release of water from Heron Reservoir to provide up to 50,000 acre feet plus evaporation loss annually to Elephant Butte for a recreation pool, does not demonstrate that storage at Elephant Butte is prohibited absent express Congressional authorization. Storage at Elephant Butte for purposes which are Congressionally authorized and which constitute beneficial uses under State law would not violate the provisions of the Colorado River Storage Project Act and the Act of June 13, 1962. Rather, the Act of March 26, 1964 and section 1401 of the Reclamation Development Act were passed in order to provide authorization because water was to be released without a contract as required by section 11 of the Act of June 13, 1962 and to be used solely for recreational purposes. It cannot be inferred from these statutes that water received by contract purchasers is not to be stored at Elephant Butte for municipal, industrial, or irrigation purposes. *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126 (10th Cir. 1981).

WATER RESOURCES RESEARCH ACT OF 1964

An act to establish water resources research centers, to promote a more adequate national program of water research, and for other purposes. (Act of July 17, 1964, Public Law 88–379, 78 Stat. 329)—*Repealed.*

Pages 1747-1752

EXPLANATORY NOTE

Act Repealed. Section 410(a) of the Water Research and Development Act of 1978 (Act of October 17, 1978, Public Law 95–467, 92 Stat. 1316) repealed the Water Resources Research Act of 1964, as amended. Extracts from the 1978 Act, including section 410(a), appear in Volume IV in chronological order.

NOTE OF OPINION

1. Limitation on financial assistance

The Secretary may not approve a grant under Title II of the Water Resources Research Act of 1964 to assist in financing a research project proposed by the Federation of Rocky Mountain States, Inc. in 1971, a principal feature of which is a study of augmenting the water resources of the Colorado River Basin by regional water transfers from Canada. The Act specifically limits financial assistance to research which is "related to the mission of the Department of the Interior." As section 201 of the Colorado River Basin Project Act expressly prohibits the Secretary from undertaking studies for the importation of water into the Colorado River Basin from areas outside certain States during the ten years after its enactment, the proposed project cannot be related to the Department's mission. Solicitor Melich Opinion, M-36830 (June 29, 1971).

INTERNATIONAL FLOOD CONTROL MEASURES, LOWER COLORADO RIVER

Pages 1753-1754

Sec. 3. [Appropriations.]—There is authorized to be appropriated to the Department of State for use of the United States Section, International Boundary and Water Commission, United States and Mexico, not in excess of $300,000 for the initial cost of the work authorized in this Act, and not to exceed $30,000 based on December 1975 prices, plus or minus such amounts as may be justified by reason of ordinary fluctuations in operation and maintenance costs involved therein, annually thereafter for necessary maintenance. (78 Stat. 386; § 7(b), Act of October 18, 1973, 87 Stat. 452; § 514(b), Act of August 17, 1977, 91 Stat. 862; 22 U.S.C. § 277d-28)

EXPLANATORY NOTES

1977 Amendment. Section 514(b) of the Act of August 17, 1977 (Public Law 95-105, 91 Stat. 862) amended section 3 by inserting "based on December 1975 prices, plus or minus such amounts as may be justified by reason of ordinary fluctuations in operation and maintenance costs involved therein," following "$30,000". The 1977 Act does not appear herein.

1973 Amendment, Section 7(b) of the Act of October 18, 1973 (Public Law 93-126, 87 Stat. 452) amended section 3 by substituting "$30,000" for "$20,000". The 1973 Act does not appear herein.

INCREASED AUTHORIZATION, MISSOURI RIVER BASIN PROJECT

Page 1755

EXPLANATORY NOTE

Supplementary Provision: Nonreimbursable Costs. The Act of October 29, 1971 (Public Law 92–149, 85 Stat. 416) provides that costs of investigations and surveys of potential units or divisions of the Pick-Sloan Missouri River Basin Program requiring amendatory authorization under the terms of this Act shall be nonreimbursable after October 29, 1971. The 1971 Act appears in Volume IV in chronological order.

NOTES OF OPINIONS

1. Reauthorization requirement

The Act of August 14, 1964 (Public Law No. 88-442) and subsequent acts increasing the appropriation authorization for the Pick-Sloan Missouri Basin Program require all units of the Missouri River Basin project on which construction had not begun prior to 1964 to be reauthorized by Congress. This includes the Grass Rope Unit. Memorandum of Acting Associate Solicitor McBride, June 15, 1981.

The limitation in the Acts of August 14, 1964 (78 Stat. 466) and July 19, 1966 (80 Stat. 322) proscribing the use of appropriated funds for the initiation of construction of any unit of the Missouri River Basin project not subsequently authorized, does not apply to transmission lines necessary for marketing power and energy from generating facilities already completed or under construction. Memorandum of Acting Solicitor Weinberg, June 29, 1967, in re authority to construct 345-KV transmission line from Fort Thompson, South Dakota, to Grand Island, Nebraska.

PACIFIC NORTHWEST POWER MARKETING

Pages 1760-1761

[Sec. 1. Definitions.]—As used in this Act—

(a) "Secretary" means the Secretary of Energy.

(b) "Pacific Northwest" means (1) the region consisting of the States of Oregon and Washington, the State of Montana west of the Continental Divide, and such portions of the States of Nevada, Utah, and Wyoming within the Columbia drainage basin and of the State of Idaho as the Secretary may determine to be within the marketing area of the Federal Columbia River power system, and (2) any contiguous areas, not in excess of seventy-five airline miles from said region, which are a part of the service area of a rural electric cooperative served by the Administrator on the effective date of the Pacific Northwest Electric Power Planning and Conservation Act which has a distribution system from which it serves both within and without said region.

* * * * *

(78 Stat. 756; § 302(a), Act of August 4, 1977, 91 Stat. 578; § 8(e), Act of December 5, 1980, 94 Stat. 2729; 16 U.S.C. § 837)

EXPLANATORY NOTES

1980 Amendment. Section 8(e) of the Act of December 5, 1980 (Public Law 96-501, 94 Stat. 2729) amended subsection (b)(2) to read as it appears in the text above. The 1980 Act appears in Volume IV in chronological order.

Reorganization, Transfer of Functions, and Change of Name. The Federal Power Commission, referred to in subsection (g), was terminated and its functions, personnel, property, and appropriations authorizations and allocations transferred to the Secretary of Energy and the Federal Energy Regulatory Commission by sections 301(b), 401(a), 402(a), 701, and 703 of the Department of Energy Organization Act of 1977 (Act of August 4, 1977, Public Law 95-91, 91 Stat. 577, 582, 583, 605, and 606, 42 U.S.C. §§ 7151(b), 7171(a), 7172(a), 7291, and 7293). Also, section 302(a) of that Act (42 U.S.C. § 7152(a)) provides for substitution of "Secretary of Energy" for "Secretary of the Interior" in subsection (a). Extracts from the 1977 Act appear in Volume IV in chronological order.

Supplementary Provision: Extension to Resources Acquired under 1980 Act. Section 9(c) of the Pacific Northwest Electric Power Planning and Conservation Act (Act of December 5, 1980, Public Law 96-501, 94 Stat. 2730) extends the provisions of the 1964 Act to resources acquired under the 1980 Act and defines the terms "surplus energy" and "surplus peaking capacity" for that purpose. The 1980 Act appears in Volume IV in chronological order.

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Sec. 8. [Restrictions on construction of transmission lines and arrangements for transmission capacity.]—No electric transmission lines or related facilities shall be constructed by any Federal agency outside the Pacific Northwest for the purpose of transmitting electric energy between the Pacific Northwest and Pacific Southwest, nor shall any arrangement for transmission capacity be executed by any Federal agency for the purpose of financing such lines and related facilities to be constructed by non-Federal entities, except those lines and facilities recommended for Federal construction in the Report of the Secretary of the Interior submitted to Congress on June 24, 1964, as supplemented on July 27, 1964, or as hereafter specifically authorized by Congress: *Provided*, That, except with respect to electric transmission lines and related facilities for the purpose of transmitting electric energy between the two regions above mentioned, nothing herein shall be construed as expanding or diminishing in any way the present authority of the Secretary of Energy to construct transmission lines to market power and energy. (78 Stat. 758; § 302(a), Act of August 4, 1977, 91 Stat. 578; 16 U.S.C. § 837g)

EXPLANATORY NOTE

Change of Name. "Secretary of Energy" was substituted for "Secretary of the Interior" in the proviso in section 8 pursuant to section 302(a) of the Department of Energy Organization Act of August 4, 1977 (Public Law 95-91, 91 Stat. 578, 42 U.S.C. § 7152(a)). Extracts from the 1977 Act, including section 302(a), appear in Volume IV in chronological order.

COMPENSATION FOR CANAL RIGHTS-OF-WAY

Pages 1766-1767

NOTES OF OPINIONS

Relationship with other laws 2-5
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  Uniform Relocation Assistance and Real Property Acquisition Policies Act 3

2. Relationship with other laws—Canal Act of 1890

The Act of September 2, 1964, which provides that, notwithstanding the Canal Act of 1890, the Secretary of the Interior shall pay just compensation to the owners of land taken for Reclamation project use for ditches or canals whose construction was begun after January 1, 1961, did not repeal the Canal act and did not in any way affect the Government's reservation of a right-of-way as set forth in the Canal Act. *United States v. 106.64 Acres of Land,* 264 F. Supp. 199 (D. Neb. 1967).

No Fifth Amendment right to just compensation arises when an easement is exercised pursuant to the Canal Act of 1890. The sole right to compensation in this instance arises from the statutory authorization of section 1 of the Act of October 4, 1966. As the latter Act does not include a provision for interest, no interest may be assessed on that portion of the verdict and judgment awarded for the taking by the Bureau of Reclamation of land subject to the Canal Act in connection with the construction of the Ainsworth Canal. *United States v. 106.64 Acres of Land,* 264 F. Supp. 199 (D. Neb. 1967).

3.—Uniform Relocation Assistance and Real Property Acquisition Policies Act

In acquiring rights-of-way under the Canal Act, the Bureau of Reclamation must comply with the provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 as the latter Act expressly applies to all real property acquisitions associated with Federal and Federally-assisted programs and projects. Even though the Canal Act refers only to reservations of rights-of-ways, Congress has recognized that such reservations constitute an acquisition of land by enacting the Acts of September 2, 1964 and October 4, 1966, providing for the payment of just compensation for land taken under the Canal Act for projects initiated after January 1, 1961. Memorandum of Associate Solicitor Morthland to Commissioner of Reclamation, July 15, 1971.

DIXIE PROJECT

Page 1768

[Sec. 1. Dixie project authorized.]—

* * * * *

EXPLANATORY NOTES

Codification Omitted. The Act of September 2, 1964 (Public Law 85-565, 78 Stat. 848), authorizing the Dixie Project, originally was codified at 43 U.S.C. §§ 616aa to 616hh but was omitted from the 1976 and subsequent editions of the U.S. Code as having limited applicability.

Reauthorization. Section 307 of the Colorado River Basin Project Act of September 30, 1968 (Public Law 90–537, 82 Stat. 893) reauthorized construction of the Dixie Project and provided for its integration with and participation in the Lower Colorado River Basin Development Fund. The 1968 Act appears in Volume IV in chronological order.

Pages 1769-1770

Sec. 8. [Appropriation.]—There is hereby authorized to be appropriated for the construction of the Dixie project, the sum of $58,000,000 plus or minus such amounts, if any, as may be justified by reason of ordinary fluctuations in construction costs as indicated by engineering cost indexes applicable to types of construction involved therein, and, in addition thereto, such sums as may be required to operate and maintain said project. (78 Stat. 849; § 307, Act of September 30, 1968, 82 Stat. 893)

EXPLANATORY NOTE

1968 Amendment. Section 307 of the Colorado River Basin Project Act of 1968 (Act of September 30, 1968, Public Law 90–537, 82 Stat. 893) amended section 8 by deleting the figure "$42,700,000" and inserting in lieu thereof the figure "$58,000,000". The 1968 Act appears in Volume IV in chronological order.

WILDLIFE MANAGEMENT, KLAMATH PROJECT

Pages 1771-1773

EXPLANATORY NOTE

Popular Name. This Act is sometimes referred to as the Kuchel Act.

NOTE OF OPINION

1. Administration of Tule Lake

The Act of September 2, 1964 does not change or otherwise affect the administration of Tule Lake-Klamath Marsh. Authority remains with the Secretary of the Interior to determine which agency of the Department shall have primary responsibility for its administration. Memorandum of Deputy Solicitor Coulter to Regional Solicitors, Portland and Sacramento, September 6, 1972.

SAVERY-POT HOOK, BOSTWICK PARK, AND FRUITLAND MESA PROJECTS

Pages 1774-1776

EXPLANATORY NOTE

Codification Omitted. The Act of September 2, 1964 (Public Law 88-568, 78 Stat. 852), authorizing the Savery-Pot Hook, Bostwick Park and Fruitland Mesa participating projects of the Colorado River Storage Project Act, originally was codified at 43 U.S.C. §§ 616ii to 616mm but was omitted from the 1976 and subsequent editions of the U.S. Code as having limited applicability.

WILDERNESS ACT

Pages 1781-1783

SPECIAL PROVISIONS

(d) The following special provisions are hereby made:

* * * * *

(5) Commercial services may be performed within the wilderness areas designated by this Act to the extent necessary for activities which are proper for realizing the recreational or other wilderness purposes of the areas.

(6) Nothing in this Act shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from State water laws.

(7) Nothing in this Act shall be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish in the national forests. (78 Stat. 894; § 4(b), Act of October 21, 1978, 92 Stat. 1650; 16 U.S.C. § 1133)

EXPLANATORY NOTE

1978 Amendment. Section 4(b) of the Act of October 21, 1978 (Public Law 95–495, 92 Stat. 1650) amended subsection (d) of section 4 by deleting paragraph (5), which dealt with the Management of the Boundary Waters Canoe Area, and renumbering paragraphs (6), (7), and (8) as (5), (6), and (7), respectively. The 1978 Act does not appear herein.

LAND AND WATER CONSERVATION FUND ACT OF 1965

Pages 1785-1788

Sec. 2. [Establishment of fund—Designation of specified revenues to fund—Proceeds from disposal of surplus property—Revenues from motorboat fuels taxes—Annual appropriations]—During the period ending September 30, 1989, there shall be covered into the land and water conservation fund in the Treasury of the United States, which fund is hereby established and is hereinafter referred to as the "fund", the following revenues and collections:

(a) All proceeds (except so much thereof as may be otherwise obligated, credited, or paid under authority of those provisions of law set forth in (section 485(b)-(e), title 40, United States Code, or the Independent Offices Appropriation Act, 1963 (76 Stat. 725) or in any later appropriation Act) hereafter received from any disposal of surplus real property and related personal property under the Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 471 et seq.), notwithstanding any provision of law that such proceeds shall be credited to miscellaneous receipts of the Treasury. Nothing in this Act shall affect existing laws or regulations concerning disposal of real or personal surplus property to schools, hospitals, and States and their political subdivisions.

(b) The amounts provided for in section 201 of this Act.

(c)(1) In addition to the sum of the revenues and collections estimated by the Secretary of the Interior to be covered into the fund pursuant to this section, as amended, there are authorized to be appropriated annually to the fund out of any money in the Treasury not otherwise appropriated such amounts as are necessary to make the income of the fund not less than $300,000,000 for fiscal year 1977, and $900,000,000 for fiscal year 1978 and for each fiscal year thereafter through September 30, 1989.

(2) To the extent that any such sums so appropriated are not sufficient to make the total annual income of the fund equivalent to the amounts provided in clause (1), an amount sufficient to cover the remainder thereof shall be credited to the fund from revenues due and payable to the United States for deposit in the Treasury as miscellaneous receipts under the Outer Continental Shelf Lands Act, as amended (43 U.S.C. 1331 et seq.): *Provided,* That notwithstanding the provisions of section 3 of this Act, moneys covered into the fund under this paragraph shall remain in the fund until appropriated by the Congress to carry out the purpose of this Act. (78 Stat. 897; § 11, Act of July 9, 1965, 79 Stat. 218; § 1(a), 2, Act of July 15, 1968, 82 Stat. 354, 355; § 2, Act of July 7, 1970, 84 Stat. 410; § 1, Act of October 22, 1970, 84 Stat. 1084; § 2(7), Act of April 21, 1976, 90 Stat. 375; § 101(1), Act of September 28, 1976, 90 Stat. 1313; § 1(1), Act of June 10, 1977, 91 Stat. 210; 16 U.S.C. § 460*l*-5)

Explanatory Notes

1977 Amendment. Section 1(1) of the Act of June 10, 1977 (Public Law 95–42, 91 Stat. 210) amended paragraph (c)(1) by substituting "and $900,000,000 for fiscal year 1978" for "$600,000,000 for fiscal year 1978, $750,000,000 for fiscal year 1979, and $900,000,000 for fiscal year 1980". The 1977 Act does not apper herein.

1976 Amendment. Section 101(1) of the Act of September 28, 1976 (Public Law 94–422, 90 Stat. 1313) amended Section 2 by: deleting from the first sentence "and during such additional period as may be required to repay any advances made pursuant to section 4(b) of this Act," after "September 30, 1989"; deleting from paragraph (c)(1) "$200,000,000 for each of the fiscal years 1968, 1969, and 1970, and not less than" following "income of the fund not less than" and inserting provisions for appropriations authorization for fiscal years 1977 through 1989; and substituting, in paragraph (c)(2), "equivalent to the amounts" for "amount to $200,000,000 or $300,000,000 for each of such fiscal years as". The 1976 Act does not appear herein.

1976 Amendment. Section 2(7) of the Act of April 21, 1976 (Public Law 94–273, 90 Stat. 375) amended section 2 by substituting "September" for "June" in each place that it appeared. The 1976 Act does not appear herein.

1970 Amendment. Section 1 of the Act of October 22, 1970 (Public Law 91–485, 84 Stat. 1084) amended paragraph (2)(c)(1) by substituting "fiscal years 1968, 1969, and 1970, and not less than $300,000,000 for each fiscal year thereafter through June 30, 1989" for "five fiscal years beginning July 1, 1968, and ending June 30, 1973", and amended paragraph (2)(c)(2) by inserting "or $300,000,000" following "$200,000,000" and "as provided in clause (1)" following "for each of such fiscal years". The 1970 Act does not appear herein.

1970 Amendment. Section 2 of the Act of July 7, 1970 (Public Law 91–308, 84 Stat. 410) amended clause (a)(i) by substituting "not more than $10" for "not more than $7". This amendment was effective only until December 31, 1971, the date on which section 1 of the 1970 Act directed that section 2(a) be repealed in pertinent part. The 1970 Act does not appear herein.

1968 Amendment. Section 1(a) of the Act of July 15, 1968 (Public Law 90–401, 82 Stat. 354) repealed all of subsection (2)(a) except the fourth paragraph, redesignated that paragraph as section 10 of the Land and Water Conservation Fund Act, and redesignated former subsections (2)(b) and (2)(c) as (2)(a) and (2)(b), respectively. Section 1(d) of the 1968 Act, as amended by section 1 of the Act of July 7, 1970, 84 Stat. 410, made the provisions amending section 2 effective December 31, 1971, and stated that until that date, "revenues derived from the subsection (a) that is repealed by [Section 1(a) of the 1968 Act] shall continue to be covered into the fund." Section 2 of the 1968 Act inserted a new subsection (2)(c). Section 5 of the 1968 Act contained an uncodified provision that allowed proceeds from certain types of conveyances entered into by the Secretary of the Interior to be credited to the Land and Water Conservation Fund. The 1968 Act does not appear herein.

Supplementary Provision: Recreation Fees Paid Into Fund Regardless of Source. Section 1 of the Act of December 12, 1980 (Public Law 96–514, Stat. 2960) provides in part that "Notwithstanding the provisions of Public Law 90–401, revenues from recreation fee collections by Federal agencies shall hereafter be paid into the Land and Water Conservation Fund, to be available for any and all purposes authorized by the Land and Water Conservation Fund Act of 1965, as amended, without regard to the source of such revenues." This provision is codified at 16 U.S.C. § 460*l*-5a. Public Law 90–401 is the Act of July 15, 1968, which amended the Land and Water Conservation Fund Act as stated in the preceding Explanatory Note. The 1980 Act does not appear herein.

Supplementary Provision: Use of Royalty Fees for "Golden Eagle Insignia." Section 3 of the Act of July 11, 1972 (Public Law 92–347, 86 Stat. 461) provided that any use of royalty fees collected for manufacture, reproduction, or use of the "Golden Eagle Insignia," the official symbol of Federal recreation areas designated for recreation fee collection, shall be covered into the Land and Water Conservation Fund. The 1972 Act does not appear herein.

Reference in the Text. The Independent Offices Appropriation Act of 1963 (Act of October 3, 1962, Public Law 87–741, 76 Stat. 716) referred to in subsection (a) of the text, provides for operating expenses, not otherwise provided for, incident to the utilization and disposal of excess and surplus property. The 1962 Act does not appear herein.

Reference in the Text. The Federal Property and Administrative Services Act of 1949 (Act of June 30, 1949, 63 Stat. 377) referred to in subsection (a) of the text, provides in section 203 for the disposition of surplus property. Extracts from section 203 appear in Volume II at page 958.

Reference in the Text. Subsections (b) through (e) of section 485 of title 40 of the U.S. Code, referred to in subsection (a) of the text, are parts of section 204 of the Federal Property and Administrative Services Act of 1949 (Act of June 30, 1949, 63 Stat. 377). They outline procedures to follow when disposing of or transferring federal surplus property. These provisions appear in Volume II at page 960.

Reference in the Text. The Outer Continental Shelf Lands Act (Act of August 7, 1953, 67 Stat. 462) referred to in subsection (c) of the text, outlines the methods for using and protecting the resources of the United States' off-shore land holdings. The 1953 Act does not appear herein.

Notes of Opinion

1. Disposition of recreation revenues

The clear import and intent of section 2(a) of the Land and Water Conservation Fund Act is that gross, and not net, revenues from recreation user fees are to be covered into the land and water conservation fund. Memorandum of Associate Solicitor Hogan to Commissioner of Reclamation, February 28, 1967.

With regard to revenues derived from the entrance, admission and other recreation user fees and charges collected by the Forest Service at areas administered by it for recreation, the Act of March 4, 1907 (34 Stat. 1295), which provides that Forest Service and national forest revenues shall be covered into miscellaneous receipts in the Treasury, was rendered ineffective by section 2(a) of the Land and Water Conservation Fund Act and remains ineffective after the amendment provided by section 11 of the Federal Water Project Recreation Act. Memorandum of Associate Solicitor Hogan to Commissioner of Reclamation, February 28, 1967.

The Act of May 23, 1908, 16 U.S.C. § 500, which mandates that twenty five percent of all revenues from each national forest be returned to the State in which the forest is situated for the benefit of public schools and public roads, is not affected by section 2(a) of the Land and Water Conservation Fund Act of 1965 when Reclamation land is transferred to the Forest Service for administration pursuant to section 7(c) of the Federal Water Project Recreation Act. It is clear from the language and the legislative history of the Land and Water Conservation Fund Act that section 2(a) of that Act was expressly intended to exempt revenues, including recreation revenues, already allocated under the 1908 Act from being diverted into the conservation fund. Memorandum of Associate Solicitor Hogan to Commissioner of Reclamation, February 28, 1967.

Where Reclamation project grazing and farm land has been transferred to the administration of the Forest Service for recreation purposes pursuant to section 7(c) of the Federal Water Project Recreation Act, whether revenues generated by recreation use should be credited to the project by subsection I of the Fact Finders' Act or diverted to the land and water conservation fund depends upon whether a liberal or restricted interpretation is given to the preservation of existing contract rights in section 2(a) of the Land and Water Conservation Fund Act. However, even under the liberal interpretation, the amount of revenue which should be set aside for meeting the contractual commitment should be equivalent to what had been available when the land was under grazing or farm lease, because to apply to the contract additional revenue generated by recreational development undertaken with appropriated funds would constitute, in our opinion, an unauthorized gift of Federal property. Memorandum of Associate Solicitor Hogan to Commissioner of Reclamation, February 28, 1967.

When Reclamation land has been transferred to the Forest Service for administration pursuant to section 7(c) of the Federal Water Project Recreation Act, the Act of July 19, 1919 (41 Stat. 202) is superseded by section 2(a) of the Land and Water Conservation Fund Act so that all proceeds from entrance and recreation user fees or charges collected and received shall be covered into the land and water conservation fund and not allocated to the reclamation fund. Memorandum of Associate Solicitor Hogan to Commissioner of Reclamation, February 28, 1967.

The legislative history of section 2(a) of the Land and Water Conservation Fund Act specifically states that revenues from the sale of auto stickers or similar devices good for admission to recreation areas generally are to be covered into the land and water conservation fund and are not subject to the two exceptions contained in section 2(a). Memorandum of Associate Solicitor Hogan to Commissioner of Reclamation, February 28, 1967.

Revenues from the sale or rental of surplus water under the Warren Act continue to be credited to the project or division of the project to which the construction cost has been charged, as provided by subsection J of the Fact Finders' Act, and are not diverted to the land and water conservation fund by section 2(a) of the Land and Water Conservation Fund Act even though project lands have been transferred to the administration of the Forest Service for recreation purposes pursuant to section 7(c) of the Federal Water Project Recreation Act. Revenues under subsection J from the sale or rental of surplus water, and revenues from entrance, admission and recreation user fees under section 2(a) are derived from totally different uses of different forms of property. Memorandum of Associate Solicitor Hogan to Commissioner of Reclamation, February 28, 1967.

Page 1789

Sec. 4. (a) [Admission fees at designated areas—"Golden Eagle Passport" annual admission permit—Single visit fees—Fee-free travel areas—"Golden Age Passport" annual entrance permit—Lifetime admission permit.]—Entrance or admission fees shall be charged only at designated units of the National Park System administered by the Department of the Interior and National Recreation Areas administered by the Department of Agriculture. No admission fees of any kind shall be charged or imposed for entrance into any other federally owned areas which are operated and maintained by a Federal agency and used for outdoor recreation purposes.

(1) For admission into any such designated area, an annual admission permit (to be known as the Golden Eagle Passport) shall be available, for a fee of not more than $10. The permittee and any person accompanying him in a single, private, noncommercial vehicle, or alternatively, the permittee and his spouse, children, and parents accompanying him where entry to the area is by any means other than private, noncommercial vehicle, shall be entitled to general admission into any area designated pursuant to this subsection. The annual permit shall be valid during the calendar year for which the annual fee is paid. The annual permit shall not authorize any uses for which additional fees are charged pursuant to subsections (b) and (c) of this section. The annual permit shall be nontransferable and the unlawful use thereof shall be punishable in accordance with regulations established pursuant to subsection (e) of this section. The annual permit shall be available for purchase at any such designated area.

(2) Reasonable admission fees for a single visit at any designated area shall be established by the administering Secretary for persons who choose not to purchase the annual permit. A "single visit" means a more or less continuous stay within a designated area. Payment of a single visit admission fee shall authorize exits from and reentries to a single designated area for a period of from one to fifteen days, such period to be defined for each designated area by the administering Secretary based upon a determination of the period of time reasonably and ordinarily necessary for such a single visit.

(3) No admission fee shall be charged for travel by private, non-commercial vehicle over any national parkway or any road or highway established as a part of the National Federal Aid System, as defined in section 101, title 23, United States Code, which is commonly used by the public as a means of travel between two places either or both of which are outside the area. Nor shall any fee be charged for travel by private noncommercial vehicle over any road or highway to any land in which such person has any property right if such land is within any such designated area. In the Smoky Mountains National Park, unless fees are charged for entrance into said park on main highways and thoroughfares, fees shall not be charged for entrance on other routes into said park or any part thereof.

(4) The Secretary of the Interior and the Secretary of Agriculture shall establish procedures providing for the issuance of a lifetime admission permit (to be known as the "Golden Age Passport") to any citizen of, or person domiciled in, the United States sixty-two years of age or older applying for such permit. Such permit shall be nontransferable, shall be issued without charge, and shall entitle the permittee and any person accompanying him in a single, private, noncommercial vehicle, or alternatively, the permittee and his spouse and children accompanying him where entry to the area is by any means other than private, noncommercial vehicle, to general admission into any area designated pursuant to this subsection. No other free permits shall be issued to any person: *Provided,* That no fees of any kind shall be collected from any persons who have a right of access for hunting or fishing privileges under a specific provision of law or treaty or who are engaged in the conduct of official Federal, State, or local Government business and *Provided further,* That for no more than three years after the date of enactment of this Act, visitors to the United States will be granted entrance, without charge, to any designated admission fee area upon presentation of a valid passport.

(5) The Secretary of the Interior and the Secretary of Agriculture shall establish procedures providing for the issuance of a lifetime admission permit to any citizen of, or person domiciled in, the United States, if such citizen or person applies for such permit, and is blind or permanently disabled. Such procedures shall assure that such permit shall be issued only to persons who have been medically determined to be blind or permanently disabled for purposes of receiving benefits under Federal law as a result of said blindness or permanent disability as determined by the Secretaries. Such permit shall be nontransferable, shall be issued without charge, and shall entitle the permittee and any person accompanying him in a single, private, noncommercial vehicle, or alternatively, the permittee and his spouse and children accompanying him where entry to the area is by any means other than private, noncommercial vehicle, to general admission into any area designated pursuant to this subsection.

(b) [Collection of recreation use fees—Campgrounds under jurisdiction of Corps of Engineers—Reduced fee for Golden Age Passport holders.]—Each Federal agency developing, administering, providing or furnishing at Federal expense, specialized outdoor recreation sites, facilities, equipment, or services shall, in accordance with this subsection and subsection (d) of this section, provide for the collection of daily recreation use fees at the place of use or any reasonably convenient location: *Provided*, That in no event shall there be a charge by any such agency for the use, either singly or in any combination, of drinking water, wayside exhibits, roads, overlook sites, visitors' centers, scenic drives, toilet facilities, picnic tables, or boat ramps: *Provided, however*, That a fee shall be charged for boat launching facilities only where specialized facilities or services such as mechanical or hydraulic boat lifts or facilities are provided: *And provided further*, That in no event shall there be a charge for the use of any campground not having the following—tent or trailer spaces, drinking water, access road, refuse containers, toilet facilities, personal collection of the fee by an employee or agent of the Federal agency operating the facility, reasonable visitor protection, and simple devices for containing a campfire (where campfires are permitted). At each lake or reservoir under the jurisdiction of the Corps of Engineers, United States Army, where camping is permitted, such agency shall provide at least one primitive campground, containing designated campsites, sanitary facilities, and vehicular access, where no charge shall be imposed. Any Golden Age Passport permittee, or permittee under paragraph (5) of subsection (a) of this section, shall be entitled upon presentation of such permit to utilize such special recreation facilities at a rate of 50 per centum of the established use fee.

(c) [Special recreation permits.]—Special recreation permits for uses such as group activities, recreation events, motorized recreation vehicles, and other specialized recreation uses may be issued in accordance with procedures and at fees established by the agency involved.

(d) [Agencies to set fees—Criteria.]—All fees established pursuant to this section shall be fair and equitable, taking into consideration the direct and indirect cost to the government, the benefits to the recipient, the public policy or interest served, the comparable recreation fees charged by non-Federal public agencies, the economic and administrative feasibility of fee collection and other pertinent factors.

Clear notice that a fee has been established pursuant to this section shall be prominently posted at each area and at appropriate locations therein and shall be included in publications distributed at such areas. It is the intent of this part that comparable fees should be charged by the several Federal agencies for comparable services and facilities.

(e) [Agencies may prescribe rules and regulations—Enforcement powers—Penalties for violations.]—In accordance with the provisions of this section, the heads of appropriate departments and agencies may prescribe rules and regulations for areas under their administration for the collection of any fee established pursuant to this section. Persons authorized by the heads of such Federal agencies to enforce any such rules or regulations issued under this subsection may, within areas under the administration or authority of such agency head and with or, if the offense is committed in his presence, without a warrant, arrest any person who violates such rules and regulations. Any person so arrested may be tried and sentenced by the

United States magistrate specifically designated for that purpose by the court by which he was appointed, in the same manner and subject to the same conditions as provided for in title 18, United States Code, section 3401, subsections (b), (c), (d), and (e), as amended. Any violations of the rules and regulations issued under this subsection shall be punishable by a fine of not more than $100.

(f) [Disposition of fees—Contracts with public or private entities for visitor reservation services.]—Except as otherwise provided by law or as may be required by lawful contracts entered into prior to September 3, 1964, providing that revenues collected at particular Federal areas shall be credited to specific purposes, all fees which are collected by any Federal agency shall be covered into a special account in the Treasury of the United States to be administered in conjunction with, but separate from, the revenues in the Land and Water Conservation Fund: *Provided*, That the head of any Federal agency, under such terms and conditions as he deems appropriate, may contract with any public or private entity to provide visitor reservation services; and any such contract may provide that the contractor shall be permitted to deduct a commission to be fixed by the agency head from the amount charged the public for providing such services and to remit the net proceeds therefrom to the contracting agency. Revenues in the special account shall be available for appropriation, without prejudice to appropriations from other sources for the same purposes, for any authorized outdoor recreation function of the agency by which the fees were collected: *Provided, however*, That not more than forty per centum of the amount so credited may be appropriated during the five fiscal years following the enactment of this Act for the enhancement of the fee collection system established by this section, including the promotion and enforcement thereof.

(g) [Federal hunting or fishing licenses or fees not authorized—State rights, authorities and permits with respect to fish and wildlife and revenue sharing unaffected.]—Nothing in this Act shall authorize Federal hunting or fishing licenses or fees or charges for commercial or other activities not related to recreation, nor shall it affect any rights or authority of the States with respect to fish and wildlife, nor shall it repeal or modify any provision of law that permits States or political subdivisions to share in the revenues from Federal lands or any provision of law that provides that any fees or charges collected at particular Federal areas shall be used for or credited to specific purposes or special funds as authorized by that provision of law.

(h) [Annual reports to Congress.]—Periodic reports indicating the number and location of fee collection areas, the number and location of potential fee collection areas, capacity and visitation information, the fees collected, and other pertinent data, shall be coordinated and compiled by the Bureau of Outdoor Recreation and transmitted to the Committees on Interior and Insular Affairs of the United States House of Representatives and United States Senate. Such reports, which shall be transmitted no later than March 31 annually, shall include any recommendations which the Bureau may have with respect to improving this aspect of the land and water conservation fund program. (As added by § 2, Act of July 11, 1972, 86 Stat. 459; amended, §§ 1, 2, Act of August 1, 1973, 87 Stat. 178, 179; § 1(b)–(j), Act of June 7, 1974, 88 Stat 192–194; § 9, Act of September 8, 1980, 94 Stat. 1135; 16 U.S.C. § 460*l*–6a.)

EXPLANATORY NOTES

1980 Amendment. Section 9 of the Act of September 8, 1980 (Public Law 96–344, 94 Stat. 1133) amended section 4 by substituting the present text of the second sentence of subsection (a)(2) for the former text; adding paragraph (5) to subsection (a) and inserting in the last sentence of subsection (b) ", or permittee under paragraph (5) of subsection (a) of this section," after "Golden Age Passport permittee". The 1980 Act does not appear herein.

1974 Amendments. Section 1(a) of the Act of June 7, 1974 (Public Law 93–303, 88 Stat. 192) amended the heading of section 4 by deleting "SPECIAL RECREATION". Section 1(b) of the Act amended subsection (a) by inserting into the second sentence "which are operated and maintained by a Federal agency" following "Federally owned areas". Section 1(c) of the Act amended paragraph (a)(1) by: in the second sentence, substituting "The permittee" for "Any person purchasing the annual permit"; inserting "or alternatively, the permittee and his spouse, children, and parents accompanying him where entry to the area is by any means other than private, noncommercial vehicle" following "single, private, noncommercial vehicle"; and deleting all that follows "pursuant to this subsection". Section 1(c) of the 1974 Act also: inserted immediately thereafter two sentences reading "the annual permit shall be valid during the calendar year for which the annual fee is paid. The annual permit shall not authorize any uses for which additional fees are charged pursuant to subsections (b) and (c) of this section."; in the former third sentence, substituted "(e)" for "(d)"; in the former fourth sentence, deleted all that follows "purchase" and substituted therefor "at any such designated area"; and deleted the former fifth sentence, which read "The Secretary of the Interior shall transfer to the Postal Service from the receipts thereof such funds as are adequate for the reimbursement of the cost of the service so provided." Section 1(d) amended subsection (a)(2) by deleting, in the first sentence, "or who enter such an area by means other than by private, noncommercial vehicle.".

Section 1(e) of the 1974 Act: amended the first sentence of subsection (a)(4) by substituting "a lifetime admission" for "an annual entrance" and "citizen of, or person domiciled in, the United States" for "person"; amended the second sentence of paragraph (a)(4) by substituting "permittee and any person accompanying him" for "bearer and any person accompanying the bearer"; inserted ", or, alternatively, the permittee and his spouse and children accompanying him where entry to the area is by any manner other than by private, noncommercial vehicle" following "in a single, noncommercial vehicle"; substituted "general admission" for "entry"; and deleted "admission fee" preceding "area".

Section 1(f) of the 1974 Act amended the first sentence of subsection (b) by: inserting ", at Federal expense," preceding "specialized" and "outdoor recreation" preceding "sites, facilities, equipment, or services"; deleting "related to outdoor recreation" and inserting ", in accordance with this subsection and subsection (d) of this section" following, "shall"; substituting "daily" for "special"; and substituting "at the place of use or any reasonably convenient location" for "for the use of sites, facilities, equipment, or services furnished at Federal expense" immediately prior to the first proviso. The first sentence of subsection (b) was further amended by: inserting the present language of the first proviso, which formerly stated, "provided, that in no event shall there be a charge for the day use or recreational use of those facilities or combination of those facilities or areas which virtually all visitors might reasonably be expected to utilize, such as, but not limited to, picnic areas, boat ramps where no mechanical or hydraulic equipment is provided, drinking water, wayside exhibits, roads, trails, overlook sites, visitors' centers, scenic drives, and toilet facilities."; inserting the present further provisos; deleting the former second sentence and inserting sentences referring to lakes and reservoirs under the jurisdiction of the Corps of

Engineers and to Golden Age Passport permittees, respectively; and deleting paragraph (b)(1), which had stated, "Daily use fees for overnight occupancy within areas specially developed for such use shall be determined on the basis of the value of the capital improvements offered, the cost of the services furnished, and other pertinent factors. Any person bearing a valid Golden Age Passport issued pursuant to paragraph (4) of subsection (a) of this section shall be entitled upon presentation of such permit to utilize such special recreation facilities at a rate of fifty per centum of the established daily use fee." Section 1(g) of the 1974 Act redesignated former subsection (b)(2) as subsection "(c) RECREATION PERMITS—", and redesignated subsequent subsections accordingly.

Section 1(h) of the 1974 Act amended the second sentence of subsection (d) by substituting "a" for "an admission fee or special recreation use" and inserting "pursuant to this section" following "has been established.".

Section 1(i) of the 1974 Act amended the first sentence of subsection (e) by substituting "fee established pursuant to this section" for "entrance fee and/or special recreation use fee, as the case may be.".

Section 1(j) of the 1974 Act amended the first sentence of subsection (f) by inserting "which are" following "all fees" and "by any Federal agency" preceding "shall be covered", and by adding the proviso.

The 1974 Act does not appear herein.

1973 Amendment. Section 1 of the Act of August 1, 1973 (Public Law 93–81, 87 Stat. 178) amended subsection (b) by inserting a first proviso clause in the first sentence and a second sentence, which provided, "No fee may be charged for access to or use of any campground not having the following—flush restrooms, showers reasonably available, access and circulatory roads, sanitary disposal stations reasonably available, visitor protection control, designated tent or trailer spaces, refuse containers and potable water." Section 2 of the Act amended subsection (a)(2) by adding a second sentence providing "A 'single visit' means that length of time a visitor remains within the exterior boundary of a designated fee area beginning from the day he first enters the area until he leaves, except that on the same day such admission fee is paid, the visitor may leave and reenter without the payment of an additional admission fee to the same area." The 1973 Act does not appear herein.

1972 Amendment. Section 2 of the Act of July 11, 1972 (Public Law 92–347, 86 Stat. 459) added a new section 4. The 1972 Act does not appear herein.

Supplementary Provision. Section 402 of the Act of October 12, 1979 (Public Law 96–87, 93 Stat. 666), as amended by section 202(3)(a) of the Act of December 2, 1980 (Public Law 96–487, 94 Stat. 2382), provides that: "Notwithstanding any other provision of law, the Secretary of the Interior shall not charge any entrance or admission fee in excess of the amounts which were in effect as of January 1, 1979, or charge said fees at any unit of the National Park System where such fees were not in effect as of this date, nor shall the Secretary charge after the date of enactment of this section, user fees for transportation services and facilities in Denali National Park, Alaska." Neither the 1979 nor the 1980 Act appears herein. This provision is codified at 16 U.S.C. 460l–6b.

Reference in the Text. Section 101 of title 23 of the United States Code, referred to in subsection (a)(3) of the text, defines the national Federal-aid highway system to include any one of the Federal-aid highway systems described in 23 U.S.C. § 103. These systems include the Federal-aid primary system, the Federal-aid urban system, the Federal-aid secondary system, and the Interstate System. These provisons do not appear herein.

Reference in the Text. Subsections (b) through (e) of section 3401 of title 18 of the U.S. Code, referred to in subsection (e) of the text, outline the procedure for trial on misdemeanor charges by a United States Magistrate. These provisions do not appear herein.

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Sec. 5. [Special account—Purposes for which appropriations available.]—There shall be submitted with the annual budget of the United States a comprehensive statement of estimated requirements during the ensuing fiscal year for appropriations from the fund. Not less than 40 per centum of such appropriations shall be available for Federal purposes. Those appropriations from the fund up to and including $600,000,000 in fiscal year 1978 and up to and including $750,000,000 in fiscal year 1979 shall continue to be allocated in accordance with this section. There shall be credited to a special account within the fund $300,000,000 in fiscal year 1978 and $150,000,000 in fiscal year 1979 from the amounts authorized by section 2 of this Act. Amounts credited to this account shall remain in the account until appropriated. Appropriations from the special account shall be available only with respect to areas existing and authorizations enacted prior to the convening of the Ninety-fifth Congress, for acquisition of lands, waters, or interests in lands or waters within the exterior boundaries, as aforesaid, of—

(1) the national park system;

(2) national scenic trails;

(3) the national wilderness preservation system;

(4) federally administered components of the National Wild and Scenic Rivers System; and

(5) national recreation areas administered by the Secretary of Agriculture (Formerly § 4, 78 Stat 900; § 3, Act of July 15, 1968, 82 Stat. 355; redesignated as § 5 by § 2, Act of July 11, 1972, 86 Stat. 459; § 3(4), Act of April 21, 1976, 90 Stat. 376; § 101(2), Act of September 28, 1976, 90 Stat. 1314; § 1(2), Act of June 10, 1977, 91 Stat. 210; 16 U.S.C. § 460*l*–7)

EXPLANATORY NOTES

1977 Amendment. Section 1(2) of the Act of June 10, 1977 (Public Law 95–42, 91 Stat. 210) amended section 5 by adding the third and subsequent sentences relating to a special account in the Land and Water Conservation Fund. The 1977 Act does not appear herein.

1976 Amendment. Section 101(2) of the Act of September 28, 1976 (Public Law 94–422, 90 Stat. 1314) amended section 5 by: deleting "AUTHORIZATION FOR ADVANCE APPROPRIATIONS" from the heading; deleting the second sentence of subsection (a) and substituting therefor "Not less than 40 per centum of such appropriations shall be available for Federal purposes."; deleting subsection (b); and striking out the subsection (a) heading in the remaining text. The 1976 Act does not appear herein.

1972 Amendment. Section 2 of the Act of July 11, 1972 (Public Law 92–347, 86 Stat. 459) renumbered former section 4 as section 5. The 1972 Act does not appear herein.

1968 Amendment. Section 3 of the Act of July 15, 1968 (Public Law 90–401, 82 Stat. 354) amended the first sentence of subsection (b) by substituting "until the end of fiscal year 1969" for "for a total of eight years". The 1968 Act does not appear herein.

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Sec. 6. [Financial assistance to States.]—(a) [Secretary of Interior authorized to make payments to States to carry out purposes of Act.]—The Secretary of the Interior (hereinafter referred to as the "Secretary") is authorized to provide financial assistance to the States from moneys available for State purposes. Payments may be made to the States by the Secretary as hereafter provided, subject to such terms and conditions as he considers appropriate and in the public interest to carry out the purposes of this Act, for outdoor recreation: (1) planning, (2) acquisition of land, waters, or interests in land or waters, or (3) development.

(b) [Apportionment among States—Finality of administrative determination—Formula—Notification—Reapportionment of unobligated amounts.]—Sums appropriated and available for State purposes for each fiscal year shall be apportioned among the several States by the Secretary, whose determination shall be final, in accordance with the following formula:

(1) Forty per centum of the first $225,000,000; thirty per centum of the next $275,000,000; and twenty per centum of all additional appropriations shall be apportioned equally among the several States; and

(2) At any time, the remaining appropriation shall be apportioned on the basis of need to individual States by the Secretary in such amounts as in his judgment will best accomplish the purposes of this Act. The determination of need shall include among other things a consideration of the proportion which the population of each State bears to the total population of the United States and of the use of outdoor recreation resources of individual States by persons from outside the State as well as a consideration of the Federal resources and programs in the particular States.

(3) The total allocation to an individual State under paragraphs (1) and (2) of this subsection shall not exceed 10 per centum of the total amount allocated to the several States in any one year.

(4) The Secretary shall notify each State of its apportionments; and the amounts thereof shall be available thereafter for payment to such State for planning, acquisition, or development projects as hereafter prescribed. Any amount of any apportionment that has not been paid or obligated by the Secretary during the fiscal year in which such notification is given and for two fiscal years thereafter shall be reapportioned by the Secretary in accordance with paragraph (2) of this subsection, without regard to the 10 per centum limitation to an individual State specified in this subsection.

(5) For the purposes of paragraph (1) of this subsection, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the commonwealth of the Northern Mariana Islands (when such islands achieve Commonwealth status) shall be treated collectively as one State, and shall receive shares of such apportionment in proportion to their populations. The above listed areas shall be treated as States for all other purposes of this title.

(c) [Matching requirements.]—Payments to any State shall cover not more than 50 per centum of the cost of planning, acquisition, or development projects that are undertaken by the State. The remaining share of the cost shall be borne by the State in a manner and with such funds or services as shall be satisfactory to the Secretary. No payment may be made to any State for or on account of any cost or obligation incurred or any service rendered prior to September 3, 1964.

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(d) [Comprehensive statewide recreation plan required prior to financial assistance—Requirements—Correlation with other State, regional and local plans.]—A comprehensive statewide outdoor recreation plan shall be required prior to the consideration by the Secretary of financial assistance for acquisition or development projects. The plan shall be adequate if, in the judgment of the Secretary, it encompasses and will promote the purposes of this Act: *Provided*, That no plan shall be approved unless the Governor of the respective State certifies that ample opportunity for public participation in plan development and revision has been accorded. The Secretary shall develop, in consultation with others, criteria for public participation, which criteria shall constitute the basis for the certification by the Governor. The plan shall contain—

(1) the name of the State agency that will have authority to represent and act for the State in dealing with the Secretary for purposes of this Act;

(2) an evaluation of the demand for and supply of outdoor recreation resources and facilities in the State;

(3) a program for the implementation of the plan; and

(4) other necessary information, as may be determined by the Secretary.

The plan shall take into account relevant Federal resources and programs and shall be correlated so far as practicable with other State, regional, and local plans. Where there exists or is in preparation for any particular State a comprehensive plan financed in part with funds supplied by the Housing and Home Finance Agency, any statewide outdoor recreation plan prepared for purposes of this Act shall be based upon the same population, growth, and other pertinent factors as are used in formulating the Housing and Home Finance Agency financed plans.

The Secretary may provide financial assistance to any State for projects for the preparation of a comprehensive statewide outdoor recreation plan when such plan is not otherwise available or for the maintenance of such plan.

(e) [Assistance from Fund for land and water acquisition and recreation facility development.]—In addition to assistance for planning projects, the Secretary may provide financial assistance to any State for the following types of projects or combinations thereof if they are in accordance with the State comprehensive plan:

(1) For the acquisition of land, waters, or interests in land or waters (other than land, waters, or interests in land or waters acquired from the United States for less than fair market value), but not including incidental costs relating to acquisition.

Whenever a State provides that the owner of a single-family residence may, at his option, elect to retain a right of use and occupancy for not less than six months from the date of acquisition of such residence and such owner elects to retain such a right, such owner shall be deemed to have waived any benefits under sections 203, 204, 205, and 206 of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (84 Stat. 1894) and for the purposes of those sections such

owner shall not be considered a displaced person as defined in section 101(6) of that Act.

(2) For development of basic outdoor recreation facilities to serve the general public, including the development of Federal lands under lease to States for terms of twenty-five years or more: *Provided*, That no assistance shall be available under this part to enclose or shelter facilities normally used for outdoor recreation activities, but the Secretary may permit local funding, and after September 28, 1976, not to exceed 10 per centum of the total amount allocated to a State in any one year to be used for sheltered facilities for swimming pools and ice skating rinks in areas where the Secretary determines that the severity of climatic conditions and the increased public use thereby made possible justifies the construction of such facilities.

(f) **[Requirements and conditions for project approval—Progress payments—Payments to Governors or State officials—State transfer of funds to public agencies—Conversion of property to other uses—Reports to Secretary--Evaluation by States—Discrimination prohibited.]**—(1) Payments may be made to States by the Secretary only for those planning, acquisition, or development projects that are approved by him. No payment may be made by the Secretary for or on account of any project with respect to which financial assistance has been given or promised under any other Federal program or activity, and no financial assistance may be given under any other Federal program or activity for or on account of any project with respect to which such assistance has been given or promised under this Act. The Secretary may make payments from time to time in keeping with the rate of progress toward the satisfactory completion of individual projects: *Provided*, That the approval of all projects and all payments, or any commitments relating thereto, shall be withheld until the Secretary receives appropriate written assurance from the State that the State has the ability and intention to finance its share of the cost of the particular project, and to operate and maintain by acceptable standards, at State expense, the particular properties or facilities acquired or developed for public outdoor recreation use.

(2) Payments for all projects shall be made by the Secretary to the Governor of the State or to a State official or agency designated by the Governor or by State law having authority and responsibility to accept and to administer funds paid hereunder for approved projects. If consistent with an approved project, funds may be transferred by the State to a political subdivision or other appropriate public agency.

(3) No property acquired or developed with assistance under this section shall, without the approval of the Secretary, be converted to other than public outdoor recreation uses. The Secretary shall approve such conversion only if he finds it to be in accord with the then existing comprehensive statewide outdoor recreation plan and only upon such conditions as he deems necessary to assure the substitution of other recreation properties of at least equal fair market value and of reasonably equivalent usefulness and location.

(4) No payment shall be made to any State until the State has agreed to (1) provide such reports to the Secretary, in such form and containing such information, as may be reasonably necessary to enable the Secretary to perform his duties under this Act, and (2) provide such fiscal control and fund accounting procedures as may be necessary to assure proper disbursement and accounting for Federal funds paid to the State under this Act.

(5) Each recipient of assistance under this Act shall keep such records as the Secretary shall prescribe, including records which fully disclose the amount and the disposition by such recipient of the proceeds of such assistance, the total cost of the project or undertaking in connection with which such assistance is given or used, and the amount and nature of that portion of the cost of the project or undertaking supplied by other sources, and such other records as will facilitate an effective audit.

(6) The Secretary, and the Comptroller General of the United States, or any of their duly authorized representatives, shall have access for the purpose of audit and examination to any books, documents, papers, and records of the recipient that are pertinent to assistance received under this Act.

(7) Each State shall evaluate its grant programs annually under guidelines set forth by the Secretary and shall transmit, so as to be received by the Secretary no later than December 31, such evaluation to the Secretary, together with a list of all projects funded during that fiscal year, including, but not limited to, a description of each project, the amount of Federal funds employed in such project, the source of other funds, and the estimated cost of completion of the project. Such evaluation and the publication of same shall be eligible for funding on a 50-50 matching basis. The results of the evaluation shall be annually reported on a fiscal year basis to the Bureau of Outdoor Recreation, which agency shall forward a summary of such reports to the Committees on Interior and Insular Affairs of the United States Congress by no later than March 1 of each year. Such report to the committees shall also include an analysis of the accomplishments of the fund for the period reported, and may also include recommendations as to future improvements for the operation of the Land and Water Conservation Fund program.

(8) With respect to property acquired or developed with assistance from the fund, discrimination on the basis of residence, including preferential reservation or membership systems, is prohibited except to the extent that reasonable differences in admission and other fees may be maintained on the basis of residence.

(g) [President authorized to issue regulations to assure consistency and coordination with other Federal programs.]—In order to assure consistency in policies and actions under this Act with other related Federal programs and activities (including those conducted pursuant to title VII of the Housing Act of 1961 (42 U.S.C. 1500 et seq.) and section 701 of the Housing Act of 1954 (40 U.S.C. 461)) and to assure coordination of the planning, acquisition, and development assistance to States under this section with other related Federal programs and activities, the President may issue such regulations with respect thereto as he deems desirable and such assistance may be provided only in accordance with such regulations. (Formerly § 5, 78 Stat. 900; redesignated as § 6 by § 2, Act of July 11, 1972, 86 Stat. 459; § 2, Act of June 7, 1974, 88 Stat. 194; § 101(3) Act of September 28, 1976, 90 Stat. 1314; § 606, Act of November 10, 1978, 92 Stat. 3519; 16 U.S.C. § 460*l*–8)

EXPLANATORY NOTES

1978 Amendment. Section 606(a) of the Act of November 10, 1978 (Public Law 95–625, 92 Stat. 3519) also known as the National Parks and Recreation Act of 1978, amended subsection (f)(7) by inserting in the first sentence thereof ", so as to be received by the Secretary no later than December 31," after "transmit". Section 606(b) of the 1978 Act amended the third sentence of subsection (f)(7) by inserting at the end thereof "by no later than March 1 of each year.". The 1978 Act does not appear herein.

1976 Amendment. Section 101(3) of the Act of September 28, 1976 (Public Law 94–422, 90 Stat. 1314) amended section 6 by: deleting from subsection (b) former paragraphs (1) and (2), and the three sentences subsequent thereto, and substituting therefor present paragraphs (1) through (5); inserting in subsection (d) the proviso to the second sentence and the third sentence; inserting in subsection (e)(2) "of basic outdoor recreation facilities to serve the general public" following "For development" and inserting the proviso; and inserting in subsection (f) appropriate paragraph numbers to previously existing paragraphs, deleting "of the Interior" following "Secretary" in paragraphs (5) and (6), and inserting paragraphs (7) and (8). The 1976 Act does not appear herein.

1974 Amendment. Section 2 of the Act of June 7, 1974 (Public Law 93–303, 88 Stat. 194) amended subsection (e)(1) by adding the final sentence. The 1974 Act does not appear herein.

1972 Amendment. Section 2 of the Act of July 11, 1972 (Public Law 92–347, 86 Stat. 459) renumbered former section 5 as section 6. The 1972 Act does not appear herein.

Reference in the Text. Sections 4601(6) and 4623 through 4626 of title 42 of the U.S. Code, referred to in subsection (e) of the text, are part of the Uniform Relocation Assistance Program and cover replacement housing for homeowners and tenants, relocation assistance advisory services, and last resort housing replacement. These provisions are part of the Act of January 2, 1971 (Public Law 91–646, 84 Stat. 1894), extracts from which appear in Volume IV in chronological order.

NOTE OF OPINION

1. Concurrent funding under Federal Water Project Recreation Act

The construction of a boat ramp and launching facility at Keswick Reservoir, under the provisions of the Land and Water Conservation Fund Act, does not prohibit the funding of other features by the Federal Water Project Recreation Act so long as the respective developments are clearly defined, separate projects for which the non-Federal portion of the cost will be met locally, because the two sources of Federal funding cannot be applied in such a way that they overlap. Memorandum of Associate Solicitor Meyer to Associate Solicitor, Reclamation and Power, March 8, 1968 in re proposed recreation management agreement with Shasta County.

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Sec. 7. [Allocation of land and water conservation fund moneys for Federal purposes.]—

(a) [Allowable purposes and subpurposes—Acquisition of land and waters and interests therein—Offset for specified capital costs.]—Moneys appropriated from the fund for Federal purposes shall, unless otherwise alloted in the appropriation Act making them available, be allotted by the President to the following purposes and subpurposes:

(1) For the acquisition of land, waters, or interests in land or waters as follows:

National Park System; Recreation Areas—Within the exterior boundaries of areas of the National Park System now or hereafter authorized or established and of areas now or hereafter authorized to be administered by the Secretary of the Interior for outdoor recreation purposes.

National Forest System—In holdings within (a) wilderness areas of the National Forest System, and (b) other areas of national forests as the boundaries of those forests exist on the effective date of this Act, or purchase units approved by the National Forest Reservation Commission subsequent to the date of this Act, all of which other areas are primarily of value for outdoor recreation purposes: *Provided*, That lands outside of but adjacent to an existing national forest boundary, not to exceed three thousand acres in the case of any one forest, which would comprise an integral part of a forest recreational management area may also be acquired with moneys appropriated from this fund: *Provided further*, That except for areas specifically authorized by Act of Congress, not more than 15 per centum of the acreage added to the National Forest System pursuant to this section shall be west of the 100th meridian.

National Wildlife Refuge System—Acquisition for (a) endangered species and threatened species authorized under section 5(a) of the Endangered Species Act of 1973; (b) areas authorized by section 2 of the Act of September 28, 1962, as amended (16 U.S.C., 460k-l); (c) national wildlife refuge areas under section 7(a)(5) of the Fish and Wildlife Act of 1956 (16 U.S.C. 742f(5)) [sic] except migratory waterfowl areas which are authorized to be acquired by the Migratory Bird Conservation Act of 1929, as amended (16 U.S.C. 715-715s); (d) any areas authorized for the National Wildlife Refuge System by specific Acts.

(2) For payment into miscellaneous receipts of the Treasury as a partial offset for those capital costs, if any, of Federal water development projects hereafter authorized to be constructed by or pursuant to an Act of Congress which are allocated to public recreation and the enhancement of fish and wildlife values and financed through appropriations to water resource agencies.

(3) Appropriations allotted for the acquisition of land, waters, or interests in land or waters as set forth under the headings "National Park System; Recreation Areas" and "National Forest System" in paragraph (1) of this subsection shall be available therefor notwithstanding any statutory ceiling on such appropriations contained in any other provision of law enacted prior to the convening of the Ninety-fifth Congress or, in the case of national recreation areas, prior to the convening of the Ninety-sixth Congress; except that for any such area expenditures may not exceed a statutory ceiling during any one fiscal year by 10 per centum of such ceiling or $1,000,000, whichever is greater. The Secretary of the Interior shall, prior to the expenditure of funds which would cause a statutory ceiling to be exceeded by $1,000,000 or more, and with respect to each expenditure of $1,000,000 or more in excess of such a ceiling, provide written notice of such proposed expenditure not less than thirty calendar days in advance to the Committee on Interior and Insular Affairs of the House of Representatives and the

Committee on Energy and Natural Resources of the Senate.

(b) [Restrictions on acquisitions.]—Appropriations from the fund pursuant to this section shall not be used for acquisition unless such acquisition is otherwise authorized by law: *Provided, however*, That appropriations from the fund may be used for preacquisition work in instances where authorization is imminent and where substantial monetary savings could be realized.

(c) [Secretary of the Interior authorized to make minor boundary changes—Restrictions—Donations.]—Whenever the Secretary of the Interior determines that to do so will contribute to, and is necessary for, the proper preservation, protection, interpretation, or management of an area of the national park system, he may, following timely notice in writing to the Committee on Interior and Insular Affairs of the House of Representatives and to the Committee on Energy and Natural Resources of the Senate of his intention to do so, and by publication of a revised boundary map or other description in the Federal Register, (i) make minor revisions of the boundary of the area, and moneys appropriated from the fund shall be available for acquisition of any lands, waters, and interests therein added to the area by such boundary revision subject to such statutory limitations, if any, on methods of acquisition and appropriations thereof as may be specifically applicable to such area: *Provided, however,* That such authority shall apply only to those boundaries established subsequent to January 1, 1965; and (ii) acquire by donation, purchase with donated funds, transfer from any other Federal agency, or exchange, lands, waters, or interests therein adjacent to such area, except that in exercising his authority under this clause (ii) the Secretary may not alienate property administered as part of the national park system in order to acquire lands by exchange, the Secretary may not acquire property without the consent of the owner, and the Secretary may acquire property owned by a State or political subdivision thereof only by donation. Prior to making a determination under this subsection, the Secretary shall consult with the duly elected governing body of the county, city, town, or other jurisdiction or jurisdictions having primary taxing authority over the land or interest to be acquired as to the impacts of such proposed action, and he shall also take such steps as he may deem appropriate to advance local public awareness of the proposed action. Lands, waters, and interests therein acquired in accordance with this subsection shall be administered as part of the area to which they are added, subject to the laws and regulations applicable thereto. (Formerly § 6, 78 Stat. 903; § 1(6), Act of July 15, 1968, 82 Stat. 355; redesignated as § 7 by § 2, Act of July 11, 1972, 86 Stat. 459; § 13(c), Act of December 28, 1973, 87 Stat. 902; § 101(4), Act of September 28, 1976, 90 Stat. 1317; § 1(3)-(5), Act of June 10, 1977, 91 Stat. 210, 211; § 2, Act of March 10, 1980, 94 Stat. 81; 16 U.S.C. § 460*l*-9.)

EXPLANATORY NOTES

1980 Amendment. Section 2 of the Act of March 10, 1980 (Public Law 96-203, 94 Stat. 81) amended section 7 by inserting in subsection (a)(3) "or, in the case of national recreation areas, prior to the convening of the Ninety-sixth Congress" after "Ninety-fifth Congress" and substituting in subsection (c) "apply only to those boundaries established subsequent to January 1, 1965" for "expire ten years from the date of enactment of the authorizing legislation establishing such boundaries;". The 1980 Act does not appear herein.

1977 Amendment. Section 1(3) of the Act of June 10, 1977 (Public Law 95–42, 91 Stat. 210) amended section 7 by adding paragraph (3) to subsection (a). Section 1(4) of the Act added the proviso relating to preacquisition work to subsection (b). Section 101(5) of the Act added subsection (c). The 1977 Act does not appear herein.

1976 Amendment. Section 101(3) of the Act of September 28, 1976 (Public Law 94–422, 90 Stat. 1317) amended subsection (a) by: inserting in the second subparagraph ", or purchase units approved by the National Forest Reservation Commission subsequent to the date of this Act, all of" following "the effective date of this Act"; substituting "three thousand" for "five hundred" in the first proviso and inserting "except for areas specifically authorized by Act of Congress" preceding "not more than 15 per centum" in the further proviso; and deleting the third and fourth subparagraphs of paragraph (1) and inserting therefor a third subparagraph headed "NATIONAL WILDLIFE REFUGE SYSTEM—". The 1976 Act does not appear herein.

1973 Amendment. Section 13(c) of the Act of December 28, 1973 (Public Law 93–205, 87 Stat. 903), commonly known as the Endangered Species Act of 1973, amended the third subparagraph of subsection (a)(1) by substituting "ENDANGERED SPECIES AND THREATENED SPECIES – for lands, water, and interests therein, the acquisition of which is authorized under Section 5(a) of the Endangered Species Act of 1973, needed for the purpose of conserving endangered or threatened species of fish or wildlife or plants." for the former text. Extracts from the 1973 Act, including section 13, appear in Volume IV in chronological order.

1972 Amendment. Section 2 of the Act of July 11, 1972 (Public Law 92–347, 86 Stat. 459) renumbered former section 6 as section 7.

1968 Amendment. Section 1(c) of the Act of July 15, 1968 (Public Law 90–401, 82 Stat. 354) amended subsection (a) by striking out the words "in substantially the same proportion as the number of visitor-days in areas and projects hereinafter described for which admission fees are charged under Section 2 of this Act." Section 1(d) of the 1968 Act provided that this amendment would be effective March 31, 1970. The 1968 Act does not appear herein.

Reference and Error in the Text. Section 7(a)(5) of the Fish and Wildlife Act of 1956 (Act of August 8, 1956, 70 Stat. 1123) originally was codified at 16 U.S.C. § 742f(a)(5), not § 742f(5) as stated in subsection (a)(1) of the text. Section 4 of the Fish and Wildlife Improvement Act of 1978 (Act of November 8, 1978, Public Law 95-616, 92 Stat. 3112) incorporated the provisions of paragraph 7(a)(5) of the 1956 Act into paragraph 7(a)(4) of that Act, so the land acquisition authority is now codified at 16 U.S.C. § 742f(a)(4). The 1956 Act does not appear herein. Extracts from the 1978 Act, not including section 4, appear in Volume IV in chronological order.

Reference in the Text. The Migratory Bird Conservation Act of 1929 (Act of February 18, 1929, 45 Stat. 1222) referred to in subsection (a) of the text, provides for the management of migratory birds and their environment. The 1929 Act does not appear herein.

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Sec. 8. [Moneys in fund not available for publicity purposes—Exceptions.]—Moneys derived from the sources listed in section 2 of this Act shall not be available for publicity purposes: *Provided, however,* That in each case where significant acquisition or development is initiated, appropriate standardized temporary signing shall be located on or near the affected site, to the extent feasible, so as to indicate the action taken is a product of funding made available through the Land and Water Conservation Fund. Such signing may indicate the per centum and dollar amounts financed by

Federal and non-Federal funds, and that the source of the funding includes moneys derived from Outer Continental Shelf receipts. The Secretary shall prescribe standards and guidelines for the usage of such signing to assure consistency of design and application. (Formerly § 7, 78 Stat. 903; redesignated as § 8 by § 2, Act of July 11, 1972, 86 Stat. 459; § 101(5), Act of September 28, 1976, 90 Stat. 1318; 16 U.S.C. § 460*l*-10.)

EXPLANATORY NOTES

1976 Amendment. Section 101(5) of the Act of September 28, 1976 (Public Law 94–422, 90 Stat. 1318) amended section 8 by adding the proviso relating to temporary signing. The 1976 Act does not appear herein.

1972 Amendment. Section 2 of the Act of July 11, 1972 (Public Law 92–347, 86 Stat. 459) renumbered former section 7 as section 8. The 1972 Act does not appear herein.

Sec. 9. [Spending limit on acquisition of properties within areas specified in section 7(a)(1)—Contracting authority.]—Not to exceed $30,000,000 of the money authorized to be appropriated from the fund by section 3 of this Act may be obligated by contract during each fiscal year for the acquisition of lands, waters, or interests therein within areas specified in section 7(a)(1) of this Act. Any such contract may be executed by the head of the department concerned, within limitations prescribed by the Secretary of the Interior. Any such contract so entered into shall be deemed a contractual obligation of the United States and shall be liquidated with money appropriated from the fund specifically for liquidation of such contract obligation. No contract may be entered into for the acquisition of property pursuant to this section unless such acquisition is otherwise authorized by Federal law. (Formerly § 8 as added by § 4, Act of July 15, 1968, 82 Stat. 355; § 3, Act of July 7, 1970, 84 Stat. 410; redesignated as § 9 by § 2, Act of July 11, 1972, 86 Stat. 459; § 3, Act of June 7, 1974, 88 Stat. 194; 16 U.S.C. § 460*l*-10a.)

EXPLANATORY NOTES

1974 Amendment. Section 3 of the Act of June 7, 1974 (Public Law 93–303, 88 Stat. 194) amended the first sentence of section 9 by substituting "7(a)(1)" for "6(a)(1)". The 1974 Act does not appear herein.

1972 Amendment. Section 2 of the Act of July 11, 1972 (Public Law 92–347, 86 Stat. 459) renumbered former section 8 as section 9. The 1972 Act does not appear herein.

1970 Amendment. Section 3 of the Act of July 7, 1970 (Public Law 91–308, 84 Stat. 410) amended section 8 by substituting "fiscal year" for "of fiscal years 1969 and 1970". The 1970 Act does not appear herein.

1968 Amendment. Section 4 of the Act of July 15, 1968 (Public Law 90–401, 82 Stat. 354) added section 8 to the Act. The 1968 Act does not appear herein.

Sec. 10. [Authority to contract for options to acquire areas authorized for inclusion in national park system.]—The Secretary of the Interior may enter into contracts for options to acquire lands, waters, or interests therein within the exterior boundaries of any area the acquisition of which is authorized by law for inclusion in the national park system. The minimum period of any such option shall be two years, and any sums expended for the purchase thereof shall be credited to the purchase price of said area.

Not to exceed $500,000 of the sum authorized to be appropriated from the fund by section 3 of this Act may be expended by the Secretary in any one fiscal year for such options. (Formerly § 9 as added by § 4, Act of July 15, 1968, 82 Stat. 355; redesignated as § 10 by § 2, Act of July 11, 1972, 86 Stat. 459; 16 U.S.C. § 460*l*-10b)

EXPLANATORY NOTES

1972 Amendment. Section 2 of the Act of July 11, 1972 (Public Law 92–347, 86 Stat. 459) renumbered former section 9 as section 10. The 1972 Act does not appear herein.

1968 Amendment. Section 4 of the Act of July 15, 1968 (Public Law 90–401, 82 Stat. 354) added section 9 of the Act. The 1968 Act does not appear herein.

Sec. 11. [Repeal of provisions prohibiting or restricting collection of recreation user fees or charges—Exception.]—All provisions of law that prohibit the collection of entrance, admission, or other recreation user fees or charges authorized by this Act or that restrict the expenditure of funds if such fees or charges are collected are hereby repealed: *Provided*, That no provision of any law or treaty which extends to any person or class of persons a right of free access to the shoreline of any reservoir or other body of water, or to hunting and fishing along or on such shoreline, shall be affected by this repealer. (Formerly § 10 as added by § 1(a), Act of July 15, 1968, 82 Stat. 354; redesignated as § 11 by § 2, Act of July 11 1972, 86 Stat. 459; 16 U.S.C. § 460*l*-10c.)

EXPLANATORY NOTES

1972 Amendment. Section 2 of the Act of July 11, 1972 (Public Law 92–347, 86 Stat. 459) renumbered former section 10 as section 11. The 1972 Act does not appear herein.

1968 Amendment. Section 1(a) of the Act of July 15, 1968 (Public Law 90–401, 82 Stat. 354) redesignated the fourth paragraph of former subsection 2(a) as section 10. Section 1(d) of the 1968 Act provided that the redesignation would be effective March 31, 1970. The 1968 Act does not appear herein.

Sec. 12. [Secretary to submit reports to Congress on urban recreation needs—Consultation with affected cities, counties and States.]—Within one year of September 28, 1976, the Secretary is authorized and directed to submit to the Committees on Interior and Insular Affairs of the Senate and House of Representatives a comprehensive review and report on the needs, problems, and opportunities associated with urban recreation in highly populated regions, including the resources potentially available for meeting such needs. The report shall include site specific analyses and alternatives, in a selection of geographic environments representative of the Nation as a whole, including, but not limited to, information on needs, local capabilities for action, major site opportunities, trends, and a full range of options and alternatives as to possible solutions and courses of action designed to preserve remaining open space, ameliorate recreational deficiency, and enhance recreational opportunity for urban populations, together with an analysis of the capability of the Federal Government to provide urban-oriented environmental education programs (including, but not limited to, cultural programs in the arts and crafts) within such options. The Secretary shall consult with, and request the views of, the affected cities, counties, and States on the alternatives and courses of action identified. (Added by § 101(6), Act of September 28, 1976, 90 Stat. 1318; 16 U.S.C. § 460*l*-10d.)

EXPLANATORY NOTE

1976 Amendment. Section 101(6) of the Act of September 28, 1976 (Public Law 94–422, 90 Stat. 1318) added section 12 to the Act. The 1976 Act does not appear herein.

Sec. 201. [Transfers to and from land and water conservation fund.]—

(a) [Motorboat fuel taxes—Set aside in land and water conservation fund.]—There shall be set aside in the land and water conservation fund in the Treasury of the United States provided for in title I of this Act the amounts specified in section 209(f)(5) of the Highway Revenue Act of 1956 (relating to special motor fuels and gasoline used in motorboats).

(b) [Refund of gasoline taxes for certain nonhighway purposes.]—There shall be paid from time to time from the land and water conservation fund into the general fund of the Treasury amounts estimated by the Secretary of the Treasury as equivalent to—

(1) the amounts paid before October 1, 1989, under section 6421 of the Internal Revenue Code of 1954 (relating to amounts paid in respect of gasoline used for certain nonhighway purposes or by local transit systems) with respect to gasoline used after December 31, 1964, in motorboats, on the basis of claims filed for periods ending before October 1, 1988; and

(2) 80 percent of the floor stocks refunds made before October 1, 1989, under section 641(a)(2) of such Code with respect to gasoline to be used in motorboats. (78 Stat. 904; § 302, Act of December 31, 1970, 84 Stat. 1743; § 3(4), Act of April 21, 1976, 90 Stat. 376; § 302, Act of May 5, 1976, 90 Stat. 456; § 503(b), Act of November 6, 1978, 92 Stat. 2757; § 531(c), Act of January 6, 1983, 96 Stat. 2191; 16 U.S.C. § 460*l*-11.)

EXPLANATORY NOTES

1983 Amendment. Section 531(c) of the Act of January 6, 1983 (Public Law 97-424, 96 Stat. 2191) amended section 201 by substituting "1989" for "1985" wherever it appeared. The 1983 Act does not appear herein.

1978 Amendment. Section 503(b) of the Act of November 6, 1978 (Public Law 95–599, 92 Stat. 2757), also known as the Surface Transportation Assistance Act of 1978, amended section 201 by substituting in subsection (b) "1984" for "1979" wherever it appeared and "1985" for "1980" wherever it appeared. The 1978 Act does not appear herein.

1976 Amendment. Section 302 of the Act of May 5, 1976 (Public Law 94–280, 90 Stat. 456), also known as the Federal-Aid Highway Act of 1976, amended section 201 by substituting in subsection (b) "1979" for "1977" wherever it appeared and "1980" for "1978" wherever it appeared. The 1976 Act does not appear herein.

1970 Amendment. Section 302 of the Act of December 31, 1970 (Public Law 91–605, 84 Stat. 1713), also known as the Federal-Aid Highway Act of 1970, amended section 201 by substituting in subsection (b) "1977" for "1972" wherever it appeared and "1978" for "1973" wherever it appeared. The 1970 Act does not appear herein.

LOWER TETON DIVISION, TETON BASIN PROJECT

Page 1796

[Sec. 1. Lower Teton Division, Teton Basin Project, Idaho.]—

* * * * *

Explanatory Note

Codification Omitted. The Act of September 7, 1964 (Public Law 88-583, 78 Stat. 925), authorizing the Lower Teton Division of the Teton Basin Project, originally was codified at 43 U.S.C. §§ 616nn to 616rr but was omitted from the 1976 and subsequent editions of the U.S. Code as having limited applicability.

Notes of Opinions

NEPA compliance 1-5
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1. Adequacy of environmental impact statement—Alternatives

Sections 102(2)(C) and 102(2)(D) of the National Environmental Policy Act, which require that an environmental impact statement present alternative courses of action, were designed to assure that such alternatives are explored in the initial decisionmaking process and to provide an opportunity to those removed from that process also to evaluate those alternatives. But the range of alternatives considered need not extend beyond those reasonably related to the purposes of the project. Consequently, where it has been established that the primary purposes of the first phase of the Teton Dam Project (authorized by the Act of September 7, 1964) were to prevent flooding and provide irrigation water and the secondary purposes were to provide hydroelectric power and recreational benefits, the environmental impact statement satisfied the requirements of the Act by considering the alternatives of (1) no development whatever, (2) ground water pumping to obtain irrigation water, and (3) levees to control flooding in the Lower Teton Valley, as well as other less reasonably related alternatives, all of which were rejected. *Trout Unlimited v. Morton*, 509 F.2d 1276 (9th Cir. 1974).

2.—Cost-benefit analysis

The environmental impact statement for the first phase of the Teton Dam Project (authorized by the Act of September 7, 1964) adequately evaluated the full range of alternatives reasonably related to project purposes without conducting a formal and mathematically expressed cost-benefit analysis. Because there is sufficient disagreement about how environmental amenities should be valued to permit any value so assigned to be challenged on the grounds of its subjectivity, in most, if not all, projects, the ultimate decision to proceed with the project is not strictly a mathematical determination. Moreover, the first phase of the Teton Dam Project has already, independently, undergone a cost-benefit analysis because of its status as a Reclamation project. *Trout Unlimited v. Morton*, 509 F.2d 1276 (9th Cir. 1974).

3.—Scope

In preparing the environmental impact statement for the first phase of the Teton Dam Project (authorized by the Act of September 7, 1964), the Bureau of Reclamation was not required to discuss the environmental impact of the second phase (the facilities identified in section 4(c) of the Act), even though it has been held that a project must be covered in a single statement where it is composed of a series of interrelated steps wherein the initial project depends on subsequent phases and together all phases constitute an integrated plan. Here the first phase is substantially independent of the second as Congress clearly intended that the first phase of this project would be constructed without regard to whether the Secretary ever submits a finding of "feasibility" with regard to the second phase. *Trout Unlimited v. Morton*, 509 F.2d 1276 (9th Cir. 1974).

The environmental impact statement for the first phase of Teton Dam Project (authorized by the Act of September 7, 1964) was not inadequate because it lacked a discussion of the environmental impact of the development of docks, second homes and corresponding structures and facilities as well as an analysis of the land use pattern changes that could result from the project. Second home development and its consequences in connection with this project are only remote possibilities. An environmental impact statement is required only to include a reasonably thorough discussion of the significant aspects of the probable environmental consequences and need not consider remote and highly speculative consequences. *Trout Unlimited v. Morton*, 509 F.2d 1276 (9th Cir. 1974).

6. Liability for flood damages

Although section 3(f) of the Teton Dam Disaster Assistance Act of 1976 permits an insurer to exercise "any right of action against the United States to which it may be entitled under any laws for payments made to [insureds] . . . ", an action by insurance companies under the Federal Tort Claims Act to recover more than $7,000,000 in claims paid to insureds because of the Teton Dam collapse is barred by 33 U.S.C. § 702c, which maintains the absolute defense of sovereign immunity for flood damages related to flood control projects. Although flood control is not an express purpose of the Teton Basin Project, it is clear from the legislative history that the project was actually intended, at least in part, to control flooding. Also, the Teton Dam Disaster was a "flood" within the meaning of § 702c. *Aetna Insurance Co. v. United States*, 628 F.2d 1201 (9th Cir. 1980), cert. denied, 450 U.S. 1025 (1981).

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Sec. 4. [Authority to amend water users' contracts—Conditions precedent to construction.]—

* * * * *

(c) *Repealed*. (78 Stat. 926; Act of October 19, 1980, 94 Stat. 2239)

EXPLANATORY NOTE

1980 Amendment. Section 108(d) of the Act of October 19, 1980 (Public Law 96–470, 94 Stat. 2239) amended Section 4 by repealing subsection (c). Section 108(d) appears as an extract from the 1980 Act in Volume IV in chronological order.

CANYONLANDS NATIONAL PARK

Page 1799

* * * * *

Sec. 2. [Acquisition of lands—Certain lands freed from withdrawal.]—Within the area which lies within the boundaries of the park, the Secretary of the Interior is authorized to acquire lands and interests in lands by such means as he may deem to be in the public interest. The Secretary may accept title to any non-Federal property within the park, including State-owned school sections and riverbed lands, and in exchange therefor he may convey to the grantor of such property any federally owned property under his jurisdiction within the State of Utah, notwithstanding any other provision of law. The properties so exchanged shall be of the same classification, as near as may be, and shall be of approximately equal value, and the Secretary shall take the administrative action to complete transfer on any lands in a proper application by the State of Utah on or before the expiration of one hundred twenty days following the date of enactment of this Act or any amendment thereto: *Provided*, That the Secretary may accept cash from, or pay cash to, the grantor in such an exchange in order to equalize the values of the properties exchanged. Federal property located within the boundaries of the park may, with the concurrence of the agency having custody thereof, be transferred to the administrative jurisdiction of the Secretary of the Interior, without consideration. for use by him in carrying out the purposes of this Act. Any lands within the boundaries of the park which are subject to Bureau of Reclamation or Federal Power Commission withdrawals are hereby freed and exonerated from any such withdrawal and shall, on the date of enactment of this Act, become a part of the Canyonlands National Park subject to no qualifications except those imposed by this Act or any amendment thereto. (78 Stat. 937; § 1(6), Act of November 12, 1971, 85 Stat. 421; 16 U.S.C. § 271a)

* * * * *

EXPLANATORY NOTES

1971 Amendment. Section 1(b) of the Act of November 12, 1971 (Public Law 92-154, 85 Stat. 421) amended section 2 by: deleting "described in section 1 hereof or" from the first sentence; inserting "or any amendment thereto" following "enactment of this Act" in the third sentence; and inserting "or any amendment thereto" following "imposed by this Act" in the fifth sentence. The 1971 Act does not appear herein.

WATERSHED CONTROL WORKS, RIO GRANDE CANALIZATION PROJECT

Pages 1805-1806

[Agreements for watershed control works.]—

* * * * *

There is hereby authorized to be appropriated not in excess of $50,000 per annum for contributions to maintenance authorized by this Act. (78 Stat. 956; § 7(6), Act of October 18, 1973, 87 Stat. 452; 22 U.S.C. § 277d-29)

EXPLANATORY NOTE

1973 Amendment. Section 7(c) of the Act of October 18, 1973 (Public Law 93-126, 87 Stat. 452) amended the 1964 Act by substituting "$50,000" for "$23,000" in the appropriations authorization for authorized maintenance. The 1973 Act does not appear herein.

CROOKED RIVER PROJECT EXTENSION

Page 1802

EXPLANATORY NOTE

Codification Omitted. The Act of September 18, 1964 (Public Law 88-598, 78 Stat. 954), authorizing the Crooked River Project Extension, originally was codified at 43 U.S.C. §§ 615f-615j-i, but was omitted from the 1976 and subsequent editions of the U.S. Code as having limited applicability.

WHITESTONE COULEE UNIT, CHIEF JOSEPH DAM PROJECT

Pages 1803-1804

EXPLANATORY NOTE

Codification Omitted. The Act of September 18, 1964 (Public Law 88-599, 78 Stat. 955), authorizing the Whitestone Coulee Unit of the Okanogan-Similkameen Division of the Chief Joseph Dam Project, originally was codified at 43 U.S.C. §§ 616ss to 616vv-5 but was omitted from the 1976 and subsequent editions of the U.S. Code as having limited applicability.

PUBLIC LAND LAW REVIEW COMMISSION

Page 1809

DUTIES OF THE COMMISSION

Sec. 4. (a) The Commission shall (i) study existing statutes and regulations governing the retention, management and disposition of the public lands; (ii) review the policies and practices of the Federal agencies charged with administrative jurisdiction over such lands insofar as such policies and practices relate to the retention, management, and disposition of those lands; (iii) compile data necessary to understand and determine the various demands on the public lands which now exist and which are likely to exist within the foreseeable future; and (iv) recommend such modifications in existing laws, regulations, policies, and practices as will, in the judgment of the commission, best serve to carry out the policy set forth in section 1 of this Act.

(b) The Commission shall, not later than June 30, 1970, submit to the President and the Congress its final report. It shall cease to exist six months after submission of said report or on December 31, 1970, whichever is earlier. All records and papers of the Commission shall thereupon be delivered to the Administrator of General Services for deposit in the Archives of the United States. (78 Stat. 893; §§ 1(1), 1(2), Act of December 18, 1967, 81 Stat. 660)

EXPLANATORY NOTE

1967 Amendment. Section 1(1) of the Act of December 18, 1967 (Public Law 90–213, 81 Stat. 660) amended section (4) by substituting in subsection (b) "June 30, 1970" for "December 31, 1968"; section 1(2) of the Act also amended subsection (b) by substituting "December 31, 1970" for "June 30, 1969". The 1967 Act does not appear herein. For legislative history of the 1967 Act, see S. Rept. No. 820 and H.R. Rept. No. 561 on H.R. 12121.

Pages 1810-1811

POWERS OF THE COMMISSION

Sec. 8. (a) The Commission or, on authorization of the Commission, any committee of two or more members, at least one of whom shall be of each major political party, may, for the purpose of carrying out the provisions of this Act, hold such hearings, take testimony or receive evidence under oath, and sit and act at such times and places as the Commission or such authorized committee may deem advisable. The member of the Commission presiding at any such hearing is authorized to administer the oath to witnesses. Subpenas for the attendance and testimony of witnesses or the production of written or other matter may be issued only on the authority of the Commission and shall be served by anyone designated by the Chairman of the Commission.

The Commission shall not issue any subpena for the attendance and testimony of witnesses or for the production of written or other matters which would require the presence of the parties subpenaed at a hearing to be held outside of the State wherein the witness is found or resides or transacts business.

A witness may submit material on a confidential basis for the use of the Commission and, if so submitted, the Commission shall not make the material public. The provisions of sections 102-104, inclusive, of the Revised Statutes (2 U.S.C. 192-194) shall apply in case of any failure of any witness to comply with any subpena or testimony when summoned under this section.

* * * * *

(78 Stat. 984; §1(4), Act of December 18, 1967, 81 Stat. 660)

EXPLANATORY NOTE

1967 Amendment. Section 1(4) of the Act of December 18, 1967 (Public Law 90–213, 81 Stat. 660) amended section 8 by inserting in subsection (a) "the member of the Commission presiding at any such hearing is authorized to administer the oath to witnesses." The 1967 Act does not appear herein. For legislative history of the 1967 Act, see S. Rept. No. 820 and H.R. Rept. No. 561 on H.R. 12121.

Pages 1811-1812

APPROPRIATIONS, EXPENSES, AND PERSONNEL

Sec. 9. (a) There are hereby authorized to be appropriated such sums, but not more than $7,390,000, as may be necessary to carry out the provisions of this subchapter and such moneys as may be appropriated shall be available to the Commission until expended.

* * * * *

(78 Stat. 985; § 1(3), Act of December 18, 1967, 81 Stat. 660)

EXPLANATORY NOTE

1967 Amendment. Section 1(3) of the Act of December 18, 1967 (Public Law 90–213, 81 Sat. 660) amended section 9 by substituting in subsection (a) "$7,390,000" for "$4,000,000". The 1967 Act does not appear herein. For legislative history of the 1967 Act, see S. Rept. No. 820 and H.R. Rept. No. 561 on H.R. 12121.

LAKE MEAD NATIONAL RECREATION AREA

Page 1815

Sec. 6. [Governing regulations—Penalties for violations.]—Such national recreation area shall continue to be administered in accordance with regulations heretofore issued by the Secretary of the Interior relating to such areas, and the Secretary may revise such regulations or issue new regulations to carry out the purposes of this Act. In his administration and regulation of the area, the Secretary shall exercise authority, subject to the provisions and limitations of this Act, comparable to his general administrative authority relating to areas of the national park system.

Any person who violates a rule or regulation issued pursuant to this Act shall be guilty of a misdemeanor, and may be punished by a fine of not more than $500, or by imprisonment not exceeding six months, or by both such fine and imprisonment. (78 Stat. 1040; § 10(a)(4), Act of August 18, 1970, Public Law 91-383, as added by § 2, Act of October 7, 1976, 90 Stat. 1941; 16 U.S.C. § 460n-5)

EXPLANATORY NOTE

1976 Amendment. Section 10(a)(4) of the Act of August 18, 1970 (Public Law 91-383), as added by section 2 of the Act of October 7, 1976 (Public Law 94-458, 90 Stat. 1941), amended section 6 by deleting the second paragraph relating to the arrest powers of the superintendent, caretakers, officers, or rangers of the Lake Mead National Recreation Area. The 1970 and 1976 Acts do not appear herein.

Page 1816

Sec. 10. [Appropriation.]—There are hereby authorized to be appropriated not more than $7,100,000 for the acquisition of land and interests in land pursuant to section 2 of this Act. (78 Stat. 1041; § 101(12), Act of October 26, 1974, 88 Stat. 1445; 16 U.S.C. § 460n-9)

EXPLANATORY NOTE

1974 Amendment. Section 101(12) of the Act of October 26, 1974 (Public Law 93-477, 88 Stat. 1445) amended section 10 by substituting "$7,100,000" for "1,200,000". The 1974 Act does not appear herein.

FEDERAL WATER PROJECT RECREATION ACT

Page 1820

[Sec. 1. Congressional policy.]—

* * * * *

NOTES OF OPINIONS

Projects, eligibility of 1
Relationship with other laws 2

1. Projects, eligibility of

Inclusion of a golf course and tennis courts in the proposed recreation plan to be made a part of the feasibility report on the Chikaskia Project, Kansas-Oklahoma, is for the purpose of "outdoor recreation" and is therefore within the purview of the Act. Memorandum of Assistant Solicitor Mauro to Commissioner of Reclamation, September 11, 1980.

Application by the Nevada Department of Fish and Game for a grant of $100,000 under the Federal Water Project Recreation Act to construct and operate a trout hatchery at Lake Mead, Boulder Canyon Project, must be denied as this is not the type of project contemplated by the Act. Moreover, the hatchery is proposed for construction within the Lake Mead National Recreation Area and section 1 of the Act prohibits its application to areas or facilities within a national recreation area. Similarly, section 7 of the Act permits construction of such facilities only after entering into an agreement in accordance with section 3(b) of the Act, but section 6(e) of the Act makes section 3 inapplicable to areas within a national recreation area. Memorandum of Associate Solicitor Morthland to Commissioner of Reclamation, July 1, 1971.

2. Relationship with other laws

Assuming that the Federal Water Project Recreation Act, which authorizes consideration of opportunities for recreation and wildlife enhancement, applies to San Juan-Chama Project water, nothing in the statute authorizes storage solely for recreational purposes. The statute does not suggest that the specific limitations of the Colorado River Storage Project Act and the Act of June 13, 1962, which make recreational use only incidental to irrigation, municipal, and industrial use, should be ignored in favor of recreation or wildlife. *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126 (10th Cir. 1981).

Pages 1820-1821

Sec. 2. [Non-Federal administration—Cost sharing.]—(a) If, before authorization of a project, non-Federal public bodies indicate their intent in writing to agree to administer project land and water areas for recreation or fish and wildlife enhancement or for both of these purposes pursuant to the plan for the development of the project approved by the head of the agency having administrative jurisdiction over it and to bear not less than one-half the separable costs of the project allocated to recreation, and to bear one-quarter of such costs allocated to fish and wildlife enhancement, and all the costs of operation, maintenance, and replacement incurred therefor—

(1) the benefits of the project to said purpose or purposes shall be taken into account in determining the economic benefits of the project;

(2) costs shall be allocated to said purpose or purposes and to other purposes in a manner which will insure that all project purposes share

equitably in the advantage of multiple-purpose construction: *Provided,* That the costs allocated to recreation or fish and wildlife enhancement shall not exceed the lesser of the benefits from those functions or the costs of providing recreation or fish and wildlife enhancement benefits of reasonably equivalent use and location by the least costly alternative means; and

(3) not more than one-half the separable costs of the project allocated to recreation and exactly three-quarters of such costs allocated to fish and wildlife enhancement and all the joint costs of the project allocated to recreation and fish and wildlife enhancement shall be borne by the United States and be nonreimbursable.

Projects authorized during the calendar year 1965 may include recreation and fish and wildlife enhancement on the foregoing basis without the required indication of intent. Execution of an agreement as aforesaid shall be a prerequisite to commencement of construction of any project to which this subsection is applicable.

* * * * *

(79 Stat. 214; § 77 (a) (1), (2), Act of March 7, 1974, 88 Stat. 33; 16 U.S.C. § 460*l*-13)

EXPLANATORY NOTES

1974 Amendment. Subsection (a) of section 77 of the Water Resources Development Act of 1974 (Act of March 7, 1974, Public Law 93–251, 88 Stat. 33) amended the text preceding item (1) and the text of item (3) to read as they appear above. The amendment increased the Federal share of the separable costs allocated to fish and wildlife enhancement from fifty percent to seventy-five percent. Extracts from the 1974 Act, including section 77, appear in Volume IV in chronological order.

Supplementary Provision: Modification of Existing Cost-Sharing Requirements. Subsections (b) and (c) of section 7 of the Water Resources Development Act of 1974 (Act of March 7, 1974, Public Law 93–251, 88 Stat. 33) require that all projects and all existing cost-sharing requirements of projects not substantially completed as of March 7, 1974 shall reflect the 1974 amendment of sections 2 and 3 of the Federal Water Project Recreation Act. The 1974 amendment increased the Federal share of the separable costs allocated to fish and wildlife enhancement from fifty percent to seventy-five percent. Extracts from the 1974 Act, including section 77, appear in Volume IV in chronological order.

NOTES OF OPINIONS

Local contribution 2
Nonreservoir projects 3

2. Local contribution

The credit received by the State of Colorado against its obligations under a repayment contract pursuant to section 2 of the Federal Water Project Recreation Act is limited to the appraised value of land and interests donated for outdoor recreation and fish and wildlife enhancement purposes. Land or interests therein donated by the State for other purposes may not be included in this credit. Memorandum of Associate Solicitor Good to Field Solicitor, Amarillo, December 16, 1981, in re Closed Basin Division, San Luis Valley Project, Colorado.

3. Nonreservoir projects

The exception in section 6(e) of the Federal Water Project Recreation Act which states that section 2 of that Act shall not apply to nonreservoir flood control projects may be interpreted to also cover nonreservoir "local protection" projects. Consequently, for the purpose of planning local participation in recreation and fish and wildlife enhancement in connection with nonreservoir "local protection" projects, section 2(a) cannot be applied to nonreservoir projects authorized under section 3 of the Flood Control Act of 1936. Memorandum of Acting Associate Solicitor Davis to Regional Solicitor, Portland, September 11, 1969.

Pages 1821-1823

Sec. 3. [Basis for recreation and fish and wildlife enhancement.]—

* * * * *

(b) Notwithstanding the absence of an indication of intent as specified in subsection 2(a), lands may be provided in connection with project construction to preserve the recreation and fish and wildlife enhancement potential of the project:

(1) If non-Federal public bodies execute an agreement within ten years after initial operation of the project (which agreement shall provide that the non-Federal public bodies will administer project land and water areas for recreation or fish and wildlife enhancement or both pursuant to the plan for the development of the project approved by the head of the agency having administrative jurisdiction over it and will bear not less than one-half the costs of lands, facilities, and project modifications provided for recreation, and will bear one-quarter of such costs for fish and wildlife enhancement, and all costs of operation, maintenance, and replacement attributable thereto) the remainder of the costs of lands, facilities, and project modifications provided pursuant to this paragraph shall be nonreimbursable. Such agreement and subsequent development, however, shall not be the basis for any reallocation of joint costs of the project to recreation or fish and wildlife enhancement.

* * * * *

(79 Stat. 214; § 77 (a)(3), Act of March 7, 1974, 88 Stat. 33; 16 U.S.C. § 460*l*-14)

Explanatory Note

1974 Amendment. Section 77 of the Water Resources Development Act of 1974 (Act of March 7, 1974 Public Law 93–251, 88 Stat. 33) amended section 3(b)(1) to read as it appears in the text. The amendment increased the Federal share of the costs allocated to fish and wildlife enhancement from fifty percent to seventy-five percent. Extracts from the 1974 Act, including section 77, appear in Volume IV in chronological order.

Note of Opinion

2. Projects, eligibility of

Application by the Nevada Department of Fish and Game for a grant of $100,000 under the Federal Water Project Recreation Act to construct and operate a trout hatchery at Lake Mead, Boulder Canyon Project, must be denied as this is not the type of project contemplated by the Act. Moreover, the hatchery is proposed for construction within the Lake Mead National Recreation Area and section 1 of the Act prohibits its application to areas or facilities within a national recreation area.

Similarly, section 7 of the Act permits construction of such facilities only after entering into an agreement in accordance with subsection 3(b) of the Act, but subsection 6(e) of the Act makes section 3 inapplicable to areas within a national recreation area. Memorandum of Associate Solicitor Morthland to Commissioner of Reclamation, July 1, 1971.

Pages 1823-1824

Sec. 6. [Misc.: Reports, cost allocation, expenditures, TVA and other projects excluded, payments and repayments.]—

* * * * *

(d) This Act shall not apply to the Tennessee Valley Authority, but the Authority is authorized to recognize and provide for recreational and other public uses at any dams and reservoirs heretofore or hereafter constructed in a manner consistent with the promotion of navigation, flood control, and the generation of electrical energy, as otherwise required by law, nor to projects constructed under authority of the Small Reclamation Projects Act, as amended, or under authority of the Watershed Protection and Flood Prevention Act, as amended. (79 Stat. 216; Act of October 21, 1976, 90 Stat. 2728; 16 U.S.C. § 460*l*-17)

EXPLANATORY NOTE

1976 Amendment. The Act of October 21, 1976 (Public Law 94-576, 90 Stat. 2728) amended subsection (d) by authorizing the Tennessee Valley Authority to provide for the recreational or other public use of dams and reservoirs in a manner consistent with the promotion of navigation, flood control, and generation of electrical energy as otherwise required by law. The 1976 Act does not appear herein.

(e)

* * * * *

NOTES OF OPINIONS

Nonreservoir projects 1
Projects, eligibility of 2

1. Nonreservoir projects

The exception in section 6(e) of the Federal Water Project Recreation Act which states that section 2 of that Act shall not apply to nonreservoir flood control projects may be interpreted to also cover nonreservoir "local protection" projects. Consequently, for the purpose of planning local participation in recreation and fish and wildlife enhancement in connection with nonreservoir "local protection" projects, section 2(a) cannot be applied to nonreservoir projects authorized under section 3 of the Flood Control Act of 1936. Memorandum of Acting Associate Solicitor Davis to Regional Solicitor, Portland, September 11, 1969.

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into an agreement in accordance with subsection 3(b) of the Act, but subsection 6(e) of the Act makes section 3 inapplicable to areas within a national recreation area. Memorandum of Associate Solicitor Morthland to Commissioner of Reclamation, July 1, 1971.

Pages 1825-1826

Sec. 7. [Existing reservoirs—Other agencies.]—(a)

* * * * *

NOTES OF OPINIONS

Acquisition of lands or interests in lands 4
Authority for development 1

1. Authority for development

Application by the Nevada Department of Fish and Game for a grant of $100,000 under the Federal Water Project Recreation Act to construct and operate a trout hatchery at Lake Mead, Boulder Canyon Project, must be denied as this is not the type of project contemplated by the Act. Moreover, the hatchery is proposed for construction within the Lake Mead National Recreation Area and section 1 of the Act prohibits its application to areas or facilities within a national recreation area. Similarly, section 7 of the Act permits construction of such facilities only after entering into an agreement in accordance with subsection 3(b) of the Act, but subsection 6(e) of the Act makes section 3 inapplicable to areas within a national recreation area. Memorandum of Associate Solicitor Morthland to Commissioner of Reclamation, July 1, 1971.

The construction of a boat ramp and launching facility at Keswick Reservoir under the provisions of the Land and Water Conservation Fund Act does not prohibit the funding of other features by the Federal Water Project Recreation Act so long as the respective developments are clearly defined, separate projects for which the non-Federal portion of the cost will be met locally, since the two sources of Federal funding cannot be applied in such a way that they overlap. Memorandum of Associate Solicitor Meyer to Associate Solicitor, Reclamation and Power, March 8, 1968 in re proposed recreation management agreement with Shasta County.

4. Acquisition of lands or interests in lands

The Reclamation Project Authorization Act of 1972 authorizes the acquisition of less than fee title in Colorado State-owned lands taken for recreational areas, as section 106 of the 1972 Act incorporates by reference the Federal Water Project Recreation Act, which provides, at section 7(a), for the acquisition of "lands or interests therein." However, as Department regulations expressly require that fee title be obtained for lands needed for outdoor recreation, the Department should give notice through the Federal Register if it intends to deviate from this policy. Memorandum of Associate Solicitor Good to Field Solicitor, Amarillo, December 16, 1981, in re Closed Basin Division, San Luis Valley Project, Colorado.

(b)

* * * * *

NOTE OF OPINION

1. Grant vs. cooperative agreement or procurement contract

The principal purpose of cost sharing arrangements under the Federal Water Project Recreation Act between the Water and Power Resources Service and non-federal entities for the development and administration of outdoor recreation and fish and wildlife enhancement facilities at Federal water projects is not the acquisition by lease, purchase or barter of property or services for the direct benefit or use of the Federal Government, but rather the allocation of value to the non-federal entity to accomplish a public purpose of support authorized by a Federal statute. Also, there is no substantial involvement of the Service in the administration of the facilities. Accordingly, a grant agreement rather than a procurement contract or a cooperative agreement is the proper legal instrument to be used in funding construction of such facilities. Solicitor Martz Opinion, M-36931 (January 19, 1981).

(c)

* * * * *

NOTES OF OPINIONS

1. Disposition of revenues

Where Reclamation project grazing and farm land has been transferred to the administration of the Forest Service for recreation purposes pursuant to section 7(c) of the Federal Water Project Recreation Act, whether revenues generated by recreation use should be credited to the project by subsection I of the Fact Finders' Act or diverted to the land and water conservation fund depends upon whether a liberal or restricted interpretation is given to the preservation of existing contract rights in section 2(a) of the Land and Water Conservation Fund Act. However, even under the liberal interpretation, the amount of revenue which should be set aside for meeting the contractual commitment should be equivalent to what had been available when the land was under grazing or farm lease, because to apply to the contract additional revenue generated by recreational development undertaken with appropriated funds would constitute, in our opinion, an unauthorized gift of Federal property. Memorandum of Associate Solicitor Hogan to Commissioner of Reclamation, February 28, 1967.

Revenues from the sale or rental of surplus water under the Warren Act continue to be credited to the project or division of the project to which the construction cost has been charged, as provided by subsection J of the Fact Finders' Act, and are not diverted to the land and water conservation fund by section 2(a) of the Land and Water Conservation Fund Act even though project lands have been transferred to the administration of the Forest Service for recreation purposes pursuant to section 7(c) of the Federal Water Project Recreation Act. Revenues under subsection J from the sale or rental of surplus water, and revenues from entrance, admission, and recreation user fees under section 2(a) are derived from totally different uses of different forms of property. Memorandum of Associate Solicitor Hogan to Commissioner of Reclamation, February 28, 1967.

The Act of May 23, 1908 (16 U.S.C. § 500) which mandates that twenty-five percent of all revenues from each national forest be returned to the State in which the forest is situated for the benefit of public schools and public roads, is not affected by section 2(a) of the Land and Water Conservation Fund Act of 1965 when Reclamation land is transferred to the Forest Service for administration pursuant to section 7(c) of the Federal Water Project Recreation Act. It is clear from the language and the legislative history of the Land and Water Conservation Fund Act that section 2(a) of that Act was expressly intended to exempt revenues, including recreation revenues, already allocated under the 1908 Act from being diverted into the conservation fund. Memorandum of Associate Solicitor Hogan to Commissioner of Reclamation, February 28, 1967.

When Reclamation land has been transferred to the Forest Service for administration pursuant to section 7(c) of the Federal Water Project Recreation Act, the Act of July 19, 1919 (41 Stat. 202) is superseded by section 2(a) of the Land and Water Conservation Fund Act so that all proceeds from entrance and recreation user fees or charges collected and received shall be covered into the land and water conservation fund and not allocated to the reclamation fund. Memorandum of Associate Solicitor Hogan to Commissioner of Reclamation, February 28, 1967.

Page 1826

Sec. 8. [Reclamation feasibility reports must be specifically authorized by law.]—

* * * * *

NOTE OF OPINION

1. Central Arizona Project, Orme Dam

Considering the requirement in section 8 of the Federal Water Project Recreation Act that there be specific authority for the preparation of a feasibility report with respect to any water resource project, the language of section 301(a) of the Colorado River Basin Project Act directing the construction of "Orme Dam and Reservoir or suitable alternative" is adequate for the study of alternatives to Orme Dam but not for the preparation of a feasibility report on the raising of Roosevelt Dam by itself. Memorandum of Assistant Solicitor Mauro to Assistant Secretary, Land and Water Resources, February 26, 1980.

Page 1827

Sec. 11. [Entrance and users fees—Amendments.]—

* * * * *

NOTES OF OPINION

1. Disposition of revenues

With regard to revenues derived from entrance, admission and other recreation user fees and charges collected by the Forest Service at areas administered by it for recreation, the Act of March 4, 1907 (34 Stat. 1295), which provides that Forest Service and national forest revenues shall be covered into miscellaneous receipts in the Treasury, was rendered ineffective by section 2(a) of the Land and Water Conservation Fund Act and remains ineffective after the amendment provided by section 11 of the Federal Water Project Recreation Act. Memorandum of Associate Solicitor Hogan to Commissioner of Reclamation, February 28, 1967.

The clear import and intent of section 2(a) of the Land and Water Conservation Fund Act is that gross, and not net, revenues from recreation user fees are to be covered into the land and water conservation fund. Memorandum of Associate Solicitor Hogan to Commissioner of Reclamation, February 28, 1967.

The legislative history of section 2(a) of the Land and Water Conservation Fund Act specifically states that revenues from the sale of auto stickers or similar devices good for admission to recreation areas generally are to be covered into the land and water conservation fund and are not subject to the two exceptions contained in section 2(a) of that Act. Memorandum of Associate Solicitor Hogan to Commissioner of Reclamation, February 28, 1967.

July 22, 1965

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WATER RESOURCES PLANNING ACT

Page 1829

Sec. 101. [Membership of Council.]—There is hereby established a Water Resources Council (hereinafter referred to as the "Council") which shall be composed of the Secretary of the Interior, the Secretary of Agriculture, the Secretary of the Army, the Secretary of Commerce, the Secretary of Housing and Urban Development, the Secretary of Transportation, the Administrator of the Environmental Protection Agency, and the Secretary of Energy. The Chairman of the Council shall request the heads of other Federal agencies to participate with the Council when matters affecting their responsibilities are considered by the council. The Chairman of the Council shall be designated by the President. (79 Stat. 245; § 1(a), Act of October 16, 1975, 89 Stat. 575; § 301(b), Act of August 4, 1977, 91 Stat. 578; 42 U.S.C. § 1962a)

EXPLANATORY NOTES

1977 Transfer of Functions. Section 301(b) of the Department of Energy Organization Act (Act of August 4, 1977, Public Law 95-91, 91 Stat. 578) transferred council membership from the Chairman of the Federal Power Commission to the Secretary of Energy. Extracts from the 1977 Act, including section 301(b), appear in Volume IV in chronological order.

1975 Amendment. Section 1(a) of the Act of October 16, 1975 (Public Law 94-112, 89 Stat. 575) amended section 101 by deleting "the Secretary of Health, Education, and Welfare," and inserting in lieu thereof "the Secretary of Housing and Urban Development, the Secretary of Transportation, the Administrator of the Environmental Protection Agency,". The 1975 Act does not appear herein. For legislative history of the Act, see H.R. Rept. No. 94-504 and S. Rept. No. 94-408 on H.R. 5952.

Page 1829

Sec. 103. (a) [Principles, standards and procedures for comprehensive plans and Federal projects.]—

* * * * *

(b) [Economic evaluation of project.]—The Council shall develop standards and criteria for economic evaluation of water resource projects. For the purpose of those standards and criteria, the primary direct navigation benefits of a water resource project are defined as the product of the savings to shippers using the waterway and the estimated traffic that would use the waterway. "Savings to shippers" means the difference between (1) the freight rates or charges prevailing at the time of the study for the movement by the alternative means, and (2) those which would be charged on the proposed waterway. Estimated traffic that would use the waterway will be based on those freight rates, taking into account projections of the economic growth of the area. (79 Stat. 245; § 4(a), Act of January 12, 1983, 96 Stat. 2441; 42 U.S.C. § 1962a-2)

Explanatory Note

1983 Amendment. Section 4(a) of the Act of January 12, 1983 (Public Law 97-449, 96 Stat. 2441) designated existing provisions as subsection (a) and added subsection (b). The 1983 Act does not appear herein.

Pages 1830-1831

Sec. 105. [Administrative provisions.]—(a) For the purpose of carrying out the provisions of this Act, the Council may:

* * * * *

(5) procure services as authorized by section 15 of the Act of August 2, 1946 (5 U.S.C. 55a), at rates not in excess of the daily equivalent of the rate prescribed for grade GS-18 under section 5332 of title 5 of the United States Code in the case of individual experts or consultants;

* * * * *

(79 Stat. 246; § 1(b), Act of October 16, 1975, 89 Stat. 575; 42 U.S.C. § 1962a-4)

Explanatory Note

1975 Amendment. Section 1(b) of the Act of October 16, 1975 (Public Law 94–112, 89 Stat. 575) amended subsection (a)(5) of section 105 by deleting "to exceed $100 per diem for individuals" and inserting in lieu thereof "in excess of the daily equivalent of the rate prescribed for grade GS-18 under section 5332 of title 5 of the United States Code in the case of individual experts or consultants;". The 1975 Act does not appear herein. For legislative history of the Act, see S. Rept. No. 94–408 on H.R. 5952.

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POWERS AND ADMINISTRATIVE PROVISIONS OF THE COMMISSIONS

Sec. 205. (a) For the purpose of carrying out the provisions of this title each river basin commission may-

* * * * *

(4) employ and compensate such personnel as it deems advisable, including consultants, at rates not in excess of the daily equivalent of the rate prescribed for grade GS–18 under section 5332 of title 5 of the United States Code, and retain and compensate such professional or technical service firms as it deems advisable on a contract basis;

* * * * *

(79 Stat. 245; § 1(c), Act of October 16, 1975, 89 Stat. 575; 42 U.S.C. § 1962b-4)

EXPLANATORY NOTE

1975 Amendment. Section 1(c) of the Act of October 16, 1975 (Public Law 94–112, 89 Stat. 575) amended subsection (a)(4) of section 205 by deleting "to exceed $100 per diem" and inserting in lieu thereof "in excess of the daily equivalent of the rate prescribed for grade GS–18 under section 5332 of title 5 of the United States Code,". The 1975 Act does not appear herein. For legislative history of the Act, see H.R. Rept. No. 94–504 and S. Rept. No. 94–408 on H.R. 5952.

Page 1836

TITLE III—FINANCIAL ASSISTANCE TO THE STATES FOR COMPREHENSIVE PLANNING GRANT AUTHORIZATIONS

Sec. 301. [Appropriations authorization for State grants—Coordination of Federal and State programs]—(a) In recognition of the need for increased participation by the States in water and related land resources planning to be effective, there are hereby authorized to be appropriated to the Council $3,000,000 for fiscal year 1979 for grants to States to assist them in developing and participating in the development of comprehensive water and related land resources plans.

* * * * *

(79 Stat. 251; § 1(d), Act of October 16, 1975, 89 Stat. 575; § 1(d), Act of September 30, 1978, 92 Stat. 864; 42 U.S.C. § 1962c)

EXPLANATORY NOTES

1978 Amendment. Section 1(d) of the Act of September 30, 1978 (Public Law 95–404, 92 Stat. 864) amended subsection (a) of section 301 by deleting "for fiscal years 1977 and 1978, $5,000,000 in each such year" and inserting in lieu thereof "$3,000,000 for fiscal year 1979". The Act also provided that "Appropriations authorized by this Act for salary, pay, retirement, or other benefits for Federal employees may be increased by such additional or supplemental amounts as may be necessary for increases authorized by law." The 1978 Act does not appear herein. For legislative history of the Act, see H.R. Rept. No. 95–1158 and S. Rept. No. 95–835 on H.R. 11655.

1975 Amendment. Section 1(d) of the Act of October 16, 1975 (Public Law 94–112, 89 Stat. 575) amended subsection (a) of section 301 by deleting "for the next fiscal year beginning after the date of enactment of this Act, and for the nine succeeding fiscal years thereafter" and inserting in lieu thereof "for fiscal years 1977 and 1978,". The 1975 Act does not appear herein. For legislative history of the Act, see H.R. Rept. No. 94–504 and S. Rept.No. 94–408 on H.R. 5952.

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AUTHORIZATION OF APPROPRIATIONS

Sec. 401.

* * * * *

(79 Stat. 253; Act of October 2, 1968, 82 Stat. 935; Act of June 17, 1971, 85 Stat. 77; Act of August 20, 1972, 86 Stat. 578; Act of July 1, 1973, 87 Stat. 140; § 1(e), Act of October 16, 1975, 89 Stat. 575; § 1, Act of May 12, 1976, 90 Stat. 516; § 1, Act of June 6, 1977, 91 Stat. 209; § 1(a)-(c), Act of September 30, 1978, 92 Stat. 864; 42 U.S.C. § 1962d)

EXPLANATORY NOTE

Amendments. The authorization of appropriations provisions of section 401 have been amended periodically since 1965. It is not deemed necessary to explain those amendments herein. The most recent amendment reviewed for this publication was effected by the Act of September 30, 1978 (Public Law 95–404, 92 Stat. 864).

PUEBLO INDIAN IRRIGATION CHARGES, MIDDLE RIO GRANDE CONSERVANCY DISTRICT

Page 1840

[Payment of Pueblo Indian irrigation charges extended to 1975.]—

* * * * *

EXPLANATORY NOTE

1935 Act Amended Further. The Act of February 15, 1978 (Public Law 95–230, 92 Stat. 28) further amended the Act of August 27, 1935, as amended, to extend the provision authorizing payment of Pueblo Indian operation and maintenance charges for an indefinite period and authorized the Secretary of the Treasury to make payments under that Act. The 1978 Act appears in Volume IV in chronological order.

GARRISON DIVERSION UNIT, MISSOURI RIVER BASIN PROJECT

Page 1841

[Sec. 1. Garrison diversion unit authorized.]—

* * * * *

NOTES OF OPINIONS

Discretion to defer project construction under NEPA 1
NEPA compliance 2-7
  Environmental impact statements, adequacy 2
  Substantive 3
  Timing 4

1. Discretion to defer project constuction under NEPA

The Act of August 5, 1965 authorizing the Garrison Diversion Unit permitted the Secretary to exercise limited discretion over the timing of construction of the project to the extent authorized by the National Environmental Policy Act. The Secretary had authority to defer construction until additional environmental impact statements were prepared and perhaps also until Congress had a reasonable opportunity to reconsider the project authorization in light of newly available environmental information, but he was not authorized to promise unconditionally to defer construction until 60 days after Congress took action on the project authorization, regardless of how long Congressional action may be deferred. Thus, where the Secretary agreed in a court stipulation to halt project construction until he prepared additional environmental and other studies, submitted legislation to Congress regarding reauthorization or modification of the project and until 60 days had elapsed after Congress acted on such legislation, the agreement should be read to include the implied condition that if Congress failed to act after having had a reasonable opportunity to reconsider the 1965 authorization, the parties shall no longer be bound by the stipulation. Inasmuch as the Secretary had prepared the additional studies and submitted them to Congress, the record showed clearly that the controversy over the project was brought to the attention of Congress, and as Congress did not act after a reasonable opportunity to do so, the condition was met and the Secretary's obligations under the stipulation were discharged. *National Audubon Society, Inc., v. Watt*, 678 F.2d 299 (D.C. Cir. 1982).

2. NEPA compliance—environmental impact statements, adequacy

In determining whether the requirements of the National Environmental Policy Act were met with regard to the Garrison Diversion Unit, a draft environmental impact statement prepared in 1976 could be considered in addition to final environmental impact statements prepared in 1974 and 1979, particularly since the 1979 statement makes it clear that it was intended to act as a "supplement" to the 1976 draft statement, and, presumably, anyone who so desired could have commented on any inadequacy in the 1976 statement while the 1979 statement was being processed. *James River Flood Control Association v. Watt*, 553 F. Supp. 1284 (D. S.Dak. 1982).

Where questions concerned the degree of detail rather than the lack of it and nothing was presented to cast doubt upon the conclusion that the average annual change in water quantity in the James River in South Dakota due to the Garrison Diversion Unit would be so small as to be virtually unmeasurable, a draft environmental impact statement prepared in 1976 and final environmental impact statements prepared in 1974 and 1979, taken together, adequately put the decisionmakers on notice of the hazards to South Dakota if the project is completed and were sufficient under the requirements of NEPA even though additional facts may have been useful and it would have been desirable for there to have been more explicit recognition of the project's South Dakota impacts. *James River*

Flood Control Association v. Watt, 553 F. Supp. 1284 (D. S.Dak. 1982).

The fact that, in the Public Works for Water and Power Development and Research Act, 1978, Congress appropriated funds for the construction of the Garrison Diversion Unit, Missouri River Basin, while a suit challenging the sufficiency of the Unit's environmental impact statement was pending does not preclude judicial review by evidencing a Congressional determination that the statement complies with the National Environmental Policy Act because 1) Congress cannot legislate through the appropriations process, 2) there is no indication in the legislative history of the 1978 Act that Congress ever reviewed or debated the impact statement at issue, and 3) even if Congress makes the ultimate decision to proceed with the project it remains the role of the courts, exclusively, to determine the adequacy of the environmental impact statement. *National Audubon Society v. Andrus*, 442 F. Supp. 42 (D.D.C. 1977).

3. Substantive

Considering the low level of adverse impacts on South Dakota due to the Garrison Diversion Unit, which impacts were clearly considered in good faith in the formulation of the decision, the decades of Congressional support for the project, and the very obvious benefits that will be the result of the project in North Dakota, the decision to proceed with the 250,000-acre plan for development of the project described in a 1979 environmental impact statement was not arbitrary and capricious and did not give insufficient weight to environmental values. *James River Flood Control Association v. Watt*, 553 F. Supp. 1284 (D. S.Dak. 1982).

4. Timing

Where it was conceded that additional NEPA analysis would be required prior to making a decision to continue development of the Garrison Diversion Unit in stages so that the first phase thereof would preclude return flow from flowing into Canada and cause additional return flows in the James River in South Dakota, although the question was a close one, the Secretary had not yet gone beyond mere contemplation and accompanying study of such a course of action so as to trigger additional NEPA compliance at that time. *James River Flood Control Association v. Watt*, 553 F. Supp. 1284 (D. S.Dak. 1982).

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Sec. 4.(b) [Interest rates for Army power facilities in Missouri River Basin project.]—

* * * * *

Notes of Opinions

1. Cost allocations, "ultimate development" concept

Congress reaffirmed the intent it expressed in the Flood Control Act of 1944 (58 Stat. 887) with respect to use of the "ultimate development" concept for cost allocation and repayment purposes by enactment of the Department's interest rate recommendation in the form of section 4(b). Memorandum of Solicitor Coldiron to Secretary, December 15, 1982, in re Pick-Sloan Missouri Basin Program; open audit findings.

It was the intent of Congress in authorizing the Pick-Sloan Missouri Basin Program (PSMBP) in the Flood Control Act of 1944 that the "ultimate development" concept be used to establish cost allocations and repayment obligations and Congress reaffirmed that intent in 1965 by enacting the Department's interest rate recommendation in the form of section 4(b) of the Garrison Diversion Unit reauthorization Act. The "current development" concept cannot be used for PSMBP cost allocation and repayment purposes without the approval of Congress because such a change would violate both the intent of Congress with regard to PSMBP and section 302 of the Energy Organization Act of 1977 requiring Congressional approval of changes in cost allocations or project evaluation standards which result in a reallocation of the joint costs of completed, operational multipurpose facilities. Congressional approval of such changes can validly be secured through the appropriations process if sufficient care is taken to highlight the specific action requested distinctly and discretely, so that Congress as a whole knows exactly what is before it and can act in positive and concrete fashion. Memorandum of Solicitor Coldiron to Secretary, December 15, 1982, in re Pick-Sloan Missouri Basin Program; open audit findings.

Congressional approval would be necessary before the Secretary of the Interior could change the basis for the suballocation of power costs for the Pick-Sloan Missouri Basin Program from ultimate use to current use. Memorandum of Assistant Solicitor Mauro, October 14, 1980.

The legislative purpose in reducing the interest rate from 3 to 2½ percent on the investment allocated to commercial power in Army facilities in the Missouri River Basin was to make the one-half percent interest saving on the 81 percent of power investment available over the years as a source of revenue to assist in the repayment of irrigation facilities included in the plan of ultimate development. Consequently the Secretary of the Interior may not make a substantial shift in the suballocation of 19 percent of power costs of the Pick-Sloan Missouri Basin Program from interest-free irrigation to interest-bearing commercial power by changing the basis for the suballocation from "ultimate use" to "current use." Memorandum of Assistant Solicitor Pelz, June 13, 1973.

ALIBATES FLINT QUARRIES AND TEXAS PANHANDLE PUEBLO CULTURE NATIONAL MONUMENT

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EXPLANATORY NOTE

Change of Name. Section 321(c) of the Act of November 10, 1978 (Public Law 95–625, 92 Stat. 3488) redesignated the Alibates Flint Quarries and Texas Panhandle Pueblo Culture National Monument as the Alibates Flint Quarries National Monument. The 1978 Act does not appear herein.

AUBURN-FOLSOM SOUTH UNIT, CENTRAL VALLEY PROJECT

Pages 1847-1848

[Sec. 1. Construction—Principal works.]—

* * * * *

EXPLANATORY NOTE

Codification Omitted. The Act of September 2, 1965 (Public Law 89-161, 79 Stat. 615), authorizing the Auburn-Folsom South Unit of the Central Valley Project, originally was codified at 43 U.S.C. §§ 616aaa to 616fff-7 but was omitted from the 1976 and subsequent editions of the U.S. Code as having limited applicability.

NOTES OF OPINIONS

Applicability of state law 1
Post-authorization project modifications 2

1. Applicability of State law

As Congress has authorized the construction of the Auburn Dam and the Folsom South Canal in section 1 of the Act of September 2, 1965, Federal preemption precludes a challenge to a contract for the sale of water from the Auburn-Folsom South Unit, Central Valley Project, to the East Bay Municipal Utility District on the grounds that the construction of the Unit is contrary to State law. Section 8 of the Reclamation Act makes State water appropriation law applicable only when not inconsistent with Congressional directives. *Environmental Defense Fund, Inc. v. East Bay Municipal Utility District,* 161 Cal. Rptr. 466, 605 P.2d 1 (1980).

2. Post-authorization project modifications

Since descriptions in authorizing legislation of the number and capacity of hydroelectric units to be included in a project are merely representations of the general Congressional intent and are not to be construed as literally binding on the Bureau, authority to construct "a hydroelectric powerplant at Auburn Dam with installed capacity of approximately two hundred and forty thousand kilowatts. . ." is broad enough to authorize construction of facilities capable of generating three hundred thousand kilowatts, but expenditures cannot exceed the amount authorized in the enacting legislation. Memorandum of Associate Solicitor Miron to Commissioner of Reclamation, January 16, 1969, in re authority to modify design of power facilities.

Page 1850

Sec. 4. [State and local interests to be consulted.]—

* * * * *

NOTE OF OPINION

1. Applicability of State law

Section 4 of the Act of September 2, 1965, which provides that in designing the works and facilities of the Auburn-Folsom South Unit, Central Valley Project, the Secretary shall give due consideration to the California Water Plan and consult with local interests through public hearings, is not a Congressional directive which makes State law inapplicable to the "control, appropriation, use, or distribution of water". Thus, as section 8 of the Reclamation Act permits a State to impose on the United States' water appropriation permits any condition not inconsistent with Congressional directive, there is no Federal preemption bar to plaintiff's challenge, based on State law, to the diversion point of water sold from the Unit to the East Bay Municipal Utility District. *Environmental Defense Fund, Inc. v. East Bay Municipal Utility District,* 161 Cal. Rptr. 466, 605 P.2d 1 (1980).

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SOUTHERN NEVADA WATER PROJECT

Page 1851

[Sec. 1. Construction—Water principally for municipal and industrial use—Principal features.]—

* * * * *

EXPLANATORY NOTES

Codification Omitted. The Act of October 22, 1965 (Public Law 89-292, 79 Stat. 1068), authorizing the Southern Nevada Water Project, originally was codified at 43 U.S.C. §§ 616ggg to 616mmm but was omitted from the 1976 and subsequent editions of the U.S. Code as having limited applicability.

Change of Name. The Act of December 22, 1982 (Public Law 97-381, 96 Stat. 1937) provides that the Southern Nevada water project shall be known as the Robert B. Griffith Water Project. The 1982 Act appears in Volume IV in chronological order.

FLOOD CONTROL ACT OF 1965

Pages 1855-1856

Sec. 204. [Authorization of projects.]—

* * * * *

GILA RIVER BASIN

The project for flood protection on Indian Bend Wash, Maricopa County, Arizona, is hereby authorized substantially in accordance with the recommendations of the Chief of Engineers in House Document Numbered 303, Eighty-eighth Congress, at an estimated cost of $7,250,000. (79 Stat. 1083)

* * * * *

EXPLANATORY NOTE

Omission. The above provision was inadvertently omitted from the extracts from the Flood Control Act of 1965 contained in Volume III.

PUBLIC WORKS APPROPRIATION ACT, 1966

Page 1858

[San Luis interceptor drain—Conditions—Terminal point.]—

* * * * *

Explanatory Note

Provision Repeated. A similar provision is contained in each subsequent annual appropriation act through the most recent one reviewed for this publication, the Energy and Water Development Appropriation Act, 1982 (95 Stat. 1139), which was continued for fiscal year 1933 by section 101(f) of the Further Continuing Appropriations Act for Fiscal Year 1983 (96 Stat. 1906) with the following modifications: the Act of November 20, 1967 (81 Stat. 475) but no other acts, changed "Department of Health, Education and Welfare," to "Department of the Interior,"; in the Act of August 12, 1968 (82 Stat. 709) and subsequent acts the paragraph is completely revised to read as follows: "*Provided further,* That the final point of discharge for the interceptor drain for the San Luis Unit shall not be determined until development by the Secretary of the Interior and the State of California of a plan, which shall conform with the water quality standards of the State of California as approved by the Secretary of the Interior, to minimize any detrimental effect of the San Luis drainage waters:"; and the Act of October 5, 1971 (85 Stat. 365) and subsequent acts changed "as approved by the Secretary of the Interior," to "as approved by the Administrator of the Environmental Protection Agency,".

ANADROMOUS FISH CONSERVATION ACT

Page 1860

[Sec. 1. Secretary authorized to conclude cooperative agreements with States to conserve anadromous and Great Lakes fish—Cost sharing—Management agreements—Increase of federal share.]—(a) For the purpose of conserving, developing, and enhancing within the several States the anadromous fishery resources of the Nation that are subject to depletion from water resources developments and other causes, or with respect to which the United States has made conservation commitments by international agreements, and for the purpose of conserving, developing, and enhancing the fish in the Great Lakes and Lake Champlain that ascend streams to spawn, the Secretary of the Interior is authorized to enter into cooperative agreements with one or more States, acting jointly or severally, that are concerned with the development, conservation, and enhancement of such fish, and, whenever he deems it appropriate, with other non-Federal interests. Such agreements shall describe (1) the actions to be taken by the Secretary and the cooperating parties, (2) the benefits that are expected to be derived by the States and other non-Federal interests, (3) the estimated cost of these actions, (4) the share of such costs to be borne by the Federal Government and by the States and other non-Federal interests: *Provided,* That, except as provided in subsection (c) of this section, the Federal share, including the operation and maintenance costs of any facilities constructed by the Secretary pursuant to this Act, which he annually determines to be a proper Federal cost, shall not exceed 50 per centum of such costs exclusive of the value of any Federal land involved: *Provided further,* That the non-Federal share may be in the form of real or personal property, the value of which will be determined by the Secretary, as well as money, (5) the term of the agreement, (6) the terms and conditions for disposing of any real or personal property acquired by the Secretary during or at the end of the term of the agreement, and (7) such other terms and conditions as he deems desirable.

(b) The Secretary may also enter into agreements with the States for the operation of any facilities and management and administration of any lands or interests therein acquired or facilities constructed pursuant to this Act.

(c)(1) Whenever two or more States having a common interest in any basin jointly enter into a cooperative agreement with the Secretary under subsection (a) of this section to carry out a research and development program to conserve, develop, and enhance anadromous fishery resources of the Nation, or fish in the Great Lakes and Lake Champlain that ascend streams to spawn, the Federal share of the program costs shall be increased to a maximum of 66⅔ per centum. For the purpose of this subsection, the term "basin" includes rivers and their tributaries, lakes, and other bodies of water or portions thereof.

(2) In the case of any State that has implemented an interstate fisheries management plan for anadromous fishery resources, the Federal share of any grant made under this section to carry out activities required by such plan shall be 90 percent. (79 Stat. 1125; § 1, Act of May 14, 1970, 84 Stat. 214; § 3(a), Act of July 30, 1974, 88 Stat. 398; Act of October 17, 1978, 92 Stat. 1278; § 1, Act of November 16, 1979, 93 Stat. 859; § 14(b)(1), Act of January 12, 1983, 96 Stat. 2492; 16 U.S.C. § 757a)

EXPLANATORY NOTES

1983 Amendment. Section 14 (b)(1) of the Act of January 12, 1983 (Public Law 97–453, 96 Stat. 2492) amended subsection (c) by designating the existing provisions as paragraph (1) and adding paragraph (2). The 1983 Act does not appear herein.

1979 Amendment. Section 1 of the Act of November 16, 1979 (Public Law 96–118, 93 Stat. 859) amended subsection (c) by striking the provisions respecting the cost to the Federal government of operating and maintaining structures, devices, etc., constructed by States under cooperative agreements. The 1979 Act does not appear herein.

1978 Amendment. The Act of October 17, 1978 (Public Law 95–464, 92 Stat. 1278) amended subsections (a) and (c) by inserting "and Lake Champlain" following "Great Lakes". The 1978 Act does not appear herein.

1974 Amendment. Section 3(a) of the Act of July 30, 1974 (Public Law 93–362, 92 Stat. 1278) amended subsection (c) by substituting "66⅔ per centum" for "60 per centum". The 1974 Act does not appear herein.

1970 Amendment. Section 1 of the Act of May 14, 1970 (Public Law 91–249, 84 Stat. 214) amended section 1 by adding subsection (c) and by making the provisions of subsection (a) regarding the Federal share of the cost of conservation, development, and enhancement of the anadromous fishery resources subject to the provisions of subsection (c). The 1970 Act does not appear herein.

Pages 1860-1861

Sec. 2. [The Secretary is authorized to make surveys and studies, clear streams, build fish hatcheries, etc.—Reports to be provided to States and Congress—Water resources projects limited to those needed for fish conservation—Authority to acquire and exchange lands and accept donations of land and money.]—The Secretary, in accordance with any agreement entered into pursuant to section 1(a) of this Act, is authorized (1) to conduct such investigations, engineering and biological surveys, and research as may be desirable to carry out the program; (2) to carry out stream clearance activities; (3) to construct, install, maintain, and operate devices and structures for the improvement of feeding and spawning conditions, for the protection of fishery resources, and for facilitating the free migration of the fish and for control of the sea lamprey; (4) to construct, operate, and maintain fish hatcheries wherever necessary to accomplish the purposes of this Act; (5) to conduct such studies and make such recommendations as the Secretary determines to be appropriate regarding the development and management of any stream or other body of water for the conservation and enhancement of anadromous fishery resources and the fish in the Great Lakes and Lake Champlain that ascend streams to spawn:

* * * * *

Title to lands or interests therein acquired pursuant to this Act shall be in the cooperating States or other non-Federal interests. (79 Stat. 1125; § 1, Act of July 30, 1974, 88 Stat. 398; Act of October 17, 1978, 92 Stat. 1278; § 2, Act of November 16, 1979, 93 Stat. 859; 16 U.S.C. § 757b)

EXPLANATORY NOTES

1979 Amendment. Section 2 of the Act of November 16, 1979 (Public Law 96–118, 93 Stat. 859) amended section 2 by substituting in the last sentence "cooperating States or other non-Federal interests" for "United States". The 1979 Act does not appear herein.

1978 Amendment. The Act of October 17, 1978 (Public Law 95–464, 92 Stat. 1278) amended section 2 by inserting in clause (5) "and Lake Champlain" following "Great Lakes". The 1978 Act does not appear herein.

1974 Amendment. Section 1 of the Act of July 30, 1974 (Public Law 93–362, 88 Stat. 398) amended section 2 by inserting in clause (3) "and for control of the sea lamprey" following "migration of the fish". The 1974 Act does not appear herein.

NOTE OF OPINION

1. Federal Power Act licensing proceedings

Section 2 of the Anadromous Fish Act of 1965 gives the Secretary of the Interior special standing to appear, to intervene, to introduce evidence and to participate fully in a license proceeding before the Federal Power Commission on the proposed High Mountain Sheep Project on the Snake River. *Udall v. Federal Power Commission*, 387 U.S. 428 (1967), reversing and remanding *Washington Public Power Supply System v. Federal Power Commission*, 358 F. 2d 840 (D.C. Cir. 1966).

Page 1861

Sec. 4. [Appropriations—State allotments.]—(a) There are authorized to be appropriated to carry out the purposes of this Act not to exceed the following sums:

(1) $11,000,000 for fiscal year 1980.

(2) $13,000,000 for fiscal year 1981.

(3) $15,000,000 for fiscal year 1982.

(4) $7,500,000 for each of fiscal years 1983, 1984, and 1985.

Sums appropriated under this subsection are authorized to remain available until expended.

(b) Not more than $1,250,000 of the funds appropriated under this section in any one fiscal year shall be obligated in any one State. (79 Stat. 1126; § 2, Act of May 14, 1970, 84 Stat. 214; § 2, 3(b), Act of July 30, 1974, 88 Stat. 398; § 3, Act of November 16, 1979, 93 Stat. 859; § 14 (b)(2), Act of January 12, 1983, 96 Stat. 2492; 16 U.S.C. § 757d)

EXPLANATORY NOTE

Amendments. Section 4 was amended on four occasions from 1966 to January 1983. It is not deemed necessary to explain those amendments herein.

Page 1862

Sec. 6. [Stream pollution abatement.]—The Secretary of the Interior shall, on the basis of studies carried out pursuant to this Act and section 5 of the Fish and Wildlife Coordination Act (48 Stat. 402), as amended (16 U.S.C. 665), make recommendations to the Secretary of Health and Human Services concerning the elimination or reduction of polluting substances detrimental to fish and wildlife in interstate or navigable waters or the tributaries thereof. Such recommendations and any enforcement measures initiated pursuant thereto by the Secretary of Health and Human Services shall be designed to enhance the quality of such waters, and shall take into consideration all other legitimate uses of such waters. (79 Stat. 1126; § 509(b), Act of October 17, 1979, 93 Stat. 695; 16 U.S.C. § 757f)

EXPLANATORY NOTE

1979 Amendment. Section 509(b) of the Act of October 17, 1979 (Public Law 96-88, 93 Stat. 695) amended section 6 by substituting "Secretary of Health and Human Services" for "Secretary of Health, Education, and Welfare". The 1979 Act does not appear herein.

Page 1862

Sec. 7. [Short title.]—This Act may be cited as the "Anadromous Fish Conservation Act". (84 Stat. 214; 16 U.S.C. § 757a note)

EXPLANATORY NOTE

1970 Amendment. Section 3 of the Act of May 14, 1970 (Public Law 91-249, 84 Stat. 214) added section 7. The 1970 Act does not appear herein

WHISKEYTOWN—SHASTA—TRINITY NATIONAL RECREATION AREA

Page 1869

Sec. 10. [Appropriation.]—There are hereby authorized to be appropriated for the acquisition of lands and interests in land pursuant to the provisions of this Act not more than $21,600,000. There are also authorized to be appropriated not more than $24,649,000 for the development of recreation facilities pursuant to the provisions of this Act. (79 Stat. 1300; § 101(27), Act of November 10, 1978, 92 Stat. 3472; 16 U.S.C. § 460q-9)

Explanatory Note

1978 Amendment. Section 101(27) of the Act of November 10, 1978 (Public Law 95-625, 92 Stat. 3472) amended section 10 by increasing the appropriations authorization development of recreation facilities from $22,700,000 to $24,649,000. The 1978 Act does not appear herein.

THIRD POWERPLANT, GRAND COULEE DAM

Page 1870

[Sec. 1. Third powerplant at Grand Coulee Dam authorized—Interest rates.]—

* * * * *

NOTES OF OPINIONS

Post-authorization project modifications 1
Repayment of costs 2

1. Post-authorization project modifications

While the original design of the third powerplant at the Grand Coulee Dam, Columbia Basin Project, provided for 12 turbine-generator units producing a total of 3,600,000 kilowatts, the Secretary may, without further authorization, construct six generators at 600,000 kilowatts each and modify the design of the powerhouse to accommodate an ultimate installation of 7200 megawatts. It is clear from the history of the Act of June 14, 1966 that Congress gave the Secretary considerable discretion as to the final design and construction of the powerplant and intended that the powerhouse be designed so as to accommodate additional generating capacity when it became economically and financially feasible to do so, so long as the 3,600,000 kilowatt initial capacity limit was retained and the $390,000,000 authorized appropriation not exceeded. Memorandum of Solicitor Weinberg to Secretary of the Interior, February 21, 1967.

2. Repayment of costs

The legislative history of the parenthetical phrase in section 7 of the Bonneville Project Act, that rate schedules shall be drawn to recover costs "upon the basis of the application of such rate schedules to the capacity of the electric facilities" of the project, shows that Congress did not expect regular annual amortization payments to be made. Therefore, the phrase precludes the assessment of an interest or other monetary penalty for failure to meet a scheduled annual payment. Congressional endorsement of the absence of a binding schedule for annual amortization payments was reiterated in the 1966 House Interior Committee report on the third powerhouse at Grand Coulee Dam. Memorandum of Deputy Assistant General Counsel Pelz, November 26, 1982, in re scheduled annual repayment for power investment.

Pages 1870-1872

Sec. 2. [Consolidated financial statement for Columbia River power system—Adjustment of rates—Financial assistance to Pacific Northwest reclamation projects from net revenues of Federal Columbia River power system.]—

* * * * *

EXPLANATORY NOTES

Transfers of Functions. Section 302(a) of the Department of Energy Organization Act (Act of August 4, 1977, Public Law 95-91, 91 Stat. 578) transferred to the Secretary of Energy the responsibility under subsection (a) of this section (16 U.S.C. § 835j) to prepare an annual consolidated financial statement for the Columbia River power system. Section 7 of the Pacific Northwest Electric Power Planning and Conservation Act (Act of December 5, 1980, Public Law 96-501, 94 Stat. 2723) required confirmation and approval of the power and transmission rates of the Bonneville Power Administration by the Federal Energy Regulatory Commission; this replaced the rate review function formerly in the Federal Power Commission which was referred to in subsection (c) of this section (16 U.S.C. §835m). Extracts from the 1977 Act, including section 302(a), and the full text of the 1980 Act appear in Volume IV in chronological order.

Page 1872

Sec. 3. [Appropriations.]—

*   *   *   *   *

Notes of Opinions

Post-authorization project modifications 1
Reimbursement for damages 2

1. Post-authorization project modifications

While the original design of the third powerplant at the Grand Coulee Dam, Columbia Basin Project, provided for 12 turbine-generator units producing a total of 3,600,000 kilowatts, the Secretary may, without further authorization, construct six generators at 600,000 kilowatts each and modify the design of the powerhouse to accommodate an ultimate installation of 7200 megawatts. It is clear from the history of the Act of June 14, 1966 that Congress gave the Secretary considerable discretion as to the final design and construction of the powerplant and intended that the powerhouse be designed so as to accommodate additional generating capacity when it became economically and financially feasible to do so, so long as the 3,600,000 kilowatt initial capacity limit was retained and the $390,000,000 authorized appropriation not exceeded. Memorandum of Solicitor Weinberg to Secretary of the Interior, February 21, 1967.

2. Reimbursement for damages

In the absence of specific statutory authority, an executive department may not be reimbursed for real property loaned, used, or damaged by another department. Thus, where the Elmer City Park site (part of the Corps of Engineers' Chief Joseph Dam Project) was partially buried by Bureau of Reclamation operations in placing embankment fill and riprap along the Columbia River in conjunction with the construction of the Grand Coulee Third Powerplant, the Bureau could not reimburse the Corps for damages or relocate the park in lieu of damages, as the legislative history of the authorization of appropriations for the third powerplant indicated that Congress contemplated damage to the park, but failed to provide for reimbursement. Dec. Comp. Gen. B-169228 (April 14, 1970).

1874

INCREASED AUTHORIZATION, MISSOURI RIVER BASIN PROJECT

Page 1874

[Appropriation authorization increased—Limitations.]—There is hereby authorized to be appropriated for fiscal years 1967 and 1968 the sum of $68,000,000 for continuing the works in the Missouri River Basin to be undertaken by the Secretary of the Interior pursuant to the comprehensive plan adopted by section 9(a) of the Act approved December 22, 1944 (Public Law Numbered 534, Seventy-eighth Congress), as amended and supplemented by subsequent Acts of Congress. No part of the funds hereby authorized to be appropriated shall be available to initiate construction of any unit of the Missouri River Basin project, whether included in said comprehensive plan or not. (80 Stat. 322; Act of September 22, 1967, 81 Stat. 228)

EXPLANATORY NOTE

1967 Amendment. The Act of September 22, 1967 (Public Law 90–89, 81 Stat. 228) amended this Act by increasing the appropriation authorization from $60,000,000 to $68,000,000. The 1967 Act appears in Volume IV in chronological order.

NOTE OF OPINION

1. Applicability of limitation

The limitation in the Acts of August 14, 1964 (78 Stat. 466) and July 19, 1966 (80 Stat. 322) proscribing the use of appropriated funds for the initiation of any unit of the Missouri River Basin project not subsequently authorized does not apply to transmission lines necessary for marketing power and energy from generating facilities already completed or under construction. Memorandum of Acting Solicitor Weinberg, June 29, 1967, in re authority to construct 345-KV transmission line from Fort Thompson, South Dakota, to Grand Island, Nebraska.

MANSON UNIT, CHIEF JOSEPH DAM PROJECT

Pages 1884-1885

EXPLANATORY NOTE

Codification Omitted. The Act of September 7, 1966 (Public Law 89-557, 80 Stat. 704), authorizing the Manson Unit, Chelan Division, Chief Joseph Dam Project, originally was codified at 43 U.S.C. §§ 616vv-1 to 616vv-5 but was omitted from the 1976 and subsequent editions of the U.S. Code as having limited applicability.

FEASIBILITY STUDIES

Pages 1886-1888

[Sec. 1. Studies of proposals pending before Congress authorized.]—

* * * * *

Region 5

Chikaskia project on the Chikaskia River in south-central Kansas and north-central Oklahoma;

NOTE OF OPINION

1. Recreation plan

Inclusion of a golf course and tennis courts in the proposed recreation plan to be made a part of the feasibility report on the Chikaskia Project, Kansas-Oklahoma, is for the purpose of "outdoor recreation" and is therefore within the purview of the Federal Water Project Recreation Act of 1965, 16 U.S.C. § 460*l*-12. Memorandum from Assistant Solicitor Mauro to Commissioner of Reclamation, September 11, 1980.

LOWER RIO GRANDE SALINITY PROBLEM

Page 1897

Sec. 2. [Appropriation authorized.]—To defray costs that accrue to the United States under the agreement or agreements referred to in the first section of this Act for the construction, operation, and maintenance of drainage conveyance canal projects, there are authorized to be appropriated to the Department of State for use of the United States Section, International Boundary and Water Commission, United States and Mexico, the following amounts:

(1) Not to exceed $690,000 for costs of construction.

(2) Upon completion of construction, not to exceed $25,000 based on estimated calendar year 1976 costs, plus or minus such amounts as may be justified by reason of ordinary fluctuations in operation and maintenance costs involved therein, annually for costs of operation and maintenance. (80 Stat. 808; § 7(a), Act of October 18, 1973, 87 Stat. 452; § 514(a), Act of August 17, 1977, 91 Stat. 862; 22 U.S.C. § 277d-31)

EXPLANATORY NOTES

1977 Amendment. Section 514(a) of the Act of August 17, 1977 (Public Law 95-105, 91 Stat. 862) amended section 2 by inserting in paragraph (2) "based on estimated calendar year 1976 costs, plus or minus such amounts as may be justified by reason of ordinary fluctuations in operation and maintenance costs involved therein," following "$25,000". The 1977 Act does not appear herein.

1973 Amendment. Section 7(a) of the Act of October 18, 1973 (Public Law 93-126, 87 Stat. 452) amended section 2 by substituting "$25,000" for "$20,000". The 1973 Act does not appear herein.

TUALATIN PROJECT

Pages 1899-1901

EXPLANATORY NOTE

Codification Omitted. The Act of September 20, 1966 (Public Law 89-596, 80 Stat. 822), authorizing the Tualatin Project, originally was codified at 43 U.S.C. §§ 616nnn to 616sss but was omitted from the 1976 and subsequent editions of the U.S. Code as having limited applicability.

INTERNATIONAL FLOOD CONTROL PROJECT, TIJUANA RIVER

Page 1903

Sec. 2. [Appropriation authorized—Acquisition of land.]—Pursuant to the agreement concluded under the authority of section 1 of this Act, the United States Commissioner is authorized to construct, operate, and maintain the portion of the "International Flood Control Project, Tijuana River Basin," assigned to the United States, and there is hereby authorized to be appropriated to the Department of State for use of the United States section the sum of $10,800,000 for construction costs of such project, as modified, based on estimated June 1976 prices, plus or minus such amounts as may be justified by reason of price index fluctuations in costs involved therein, and such sums as may be necessary for its maintenance and operation, except that no funds may be appropriated under sections 1 and 2 of this Act for the fiscal year ending on September 30, 1977. Contingent upon the furnishing by the city of San Diego of its appropriate share of the funds for the acquisition of the land and interests therein needed to carry out the agreement between the United States and Mexico to construct such project, the Secretary of State, acting through the United States Commissioner, is further authorized to participate financially with non-Federal interests in the acquisition of said lands and interest therein, to the extent that funds provided by the city of San Diego are insufficient for this purpose. (80 Stat. 884; Act of September 28, 1976, 90 Stat. 1333; 22 U.S.C. § 277d-33)

EXPLANATORY NOTE

1976 Amendment. The Act of September 28, 1976 (Public Law 94–425, 90 Stat. 1333) amended section 2 by: substituting provisions authorizing appropriations of $10,000,000 for construction costs based on June 1976 prices, with the exception that no funds may be appropriated for the fiscal year ending September 30, 1977, for the former provisions authorizing appropriations not to exceed $12,600,000; eliminating the provision requiring approval of title by the Attorney General; and adding the provision authorizing financial participation by the Secretary of State through the U.S. Commissioner in the acquisition of lands for the project contingent upon the City of San Diego furnishing its appropriate share of funds. The 1976 Act does not appear herein.

1906

BIGHORN CANYON NATIONAL RECREATION AREA

Page 1906

Sec. 5. [Appropriation authorized.]—There is hereby authorized to be appropriated not more than $780,000 for the acquisition of land and interests in land pursuant to this Act. (80 Stat. 913; § 101(3), Act of April 11, 1972, 86 Stat. 120; 16 U.S.C. § 460t-4)

Explanatory Note

1972 Amendment. Section 101(3) of the Act of April 11, 1972 (Public Law 92–272, 86 Stat. 120) amended section 5 by increasing the authorized appropriation from $355,000 to $780,000. The 1972 Act does not appear herein.

CONTRACTS FOR SCIENTIFIC AND TECHNICAL RESEARCH

Page 1907

[Sec. 1. Scientific and technical research contracts authorized—Showing of capability of doing work required—Coordination of research—Reports and publications]—

* * * * *

(d) *Repealed.* (80 Stat. 951; Act of October 19, 1980, 94 Stat. 2239; 42 U.S.C. § 1900b)

Explanatory Note

1980 Amendment. Section 108(a) of the Act of October 19, 1980 (Public Law 96–470, 94 Stat. 2239) amended section 1 by repealing subsection (d). Extracts from the 1980 Act, including section 108(a), appear in Volume IV in chronological order.

1909

PUBLIC WORKS APPROPRIATION ACT, 1967

Page 1909

[Disaster relief expenditures—Reimbursement by Office of Emergency Planning.]—

* * * * *

EXPLANATORY NOTE

Error in the Text of Volume III. The citation to the Statutes at Large at the end of this provision should be 80 Stat. 1010.

DISASTER RELIEF ACT OF 1966

Pages 1912-1913

[Extracts from] An act to provide additional assistance for areas suffering a major disaster. (Act of November 6, 1966, Public Law 89–769, 80 Stat. 1316)—*Repealed.*

EXPLANATORY NOTE

1970 Repeal. Section 302 of the Disaster Relief Act of December 31, 1970 (Public Law 91–606, 84 Stat. 1759) repealed all but section 7 of this Act. A discussion of the provisions of the 1970 Act is contained in an Explanatory Note following the extracts from the Disaster Relief Act of May 22, 1974 (Public Law 93–288, 88 Stat. 143), which appear in Volume IV in chronological order.

FLOOD CONTROL ACT OF 1966

Pages 1921-1922

Sec. 203. [Projects authorized.]—

* * * * *

SACRAMENTO RIVER BASIN

[Marysville Dam.]—

* * * * *

EXPLANATORY NOTE

Subsequent Modification. Section 159 of the Water Resources Development Act of 1976 (Act of October 22, 1976, Public Law 94-587, 90 Stat. 2917) modified the Marysville Lake project, California, by authorizing the phase I design memorandum stage of advance engineering and design for a multiple-purpose project located at the Parks Bar site, including power development with pumped storage, at an estimated cost of $150,000. Extracts from the 1976 Act, not including section 159, appear in Volume IV in chronological order.

APPENDIX

Selected Administrative and Other Laws Taken from the United States Code

(As Codified Through 1985)

TITLE 1, U.S. CODE—GENERAL PROVISIONS

This title was enacted by act July 30, 1947, ch. 388 § 1, 61 Stat. 633

CHAPTER 1—RULES OF CONSTRUCTION

§ 1. Words denoting number, gender, and so forth

In determining the meaning of any Act of Congress, unless the context indicates otherwise—

words importing the singular include and apply to several persons, parties, or things;

words importing the plural include the singular;

words importing the masculine gender include the feminine as well;

words used in the present tense include the future as well as the present;

the words "insane" and "insane person" and "lunatic" shall include every idiot, lunatic, insane person, and person non compos mentis;

the words "person" and "whoever" include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals;

"officer" includes any person authorized by law to perform the duties of the office;

"signature" or "subscription" includes a mark when the person making the same intended it as such;

"oath" includes affirmation, and "sworn" includes affirmed;

"writing" includes printing and typewriting and reproductions of visual symbols by photographing, multigraphing, mimeographing, manifolding, or otherwise.

(July 30, 1947, ch. 388, 61 Stat. 633; June 25, 1948, ch. 645, § 6, 62 Stat. 859; Oct. 31, 1951, ch. 655, § 1, 65 Stat. 710.)

§ 2. "County" as including "parish", and so forth

The word "county" includes a parish, or any other equivalent subdivision of a State or Territory of the United States.
(July 30, 1947, ch. 388, 61 Stat. 633.)

§ 3. "Vessel" as including all means of water transportation

The word "vessel" includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.
(July 30, 1947, ch. 388, 61 Stat. 633.)

§ 4. "Vehicle" as including all means of land transportation

The word "vehicle" includes every description of carriage or other ar-

tificial contrivance used, or capable of being used, as a means of transportation on land.
(July 30, 1947, ch. 388, 61 Stat. 633.)

§ 5. "Company" or "association" as including successors and assigns

The word "company" or "association", when used in reference to a corporation, shall be deemed to embrace the words "successors and assigns of such company or association", in like manner as if these last-named words, or words of similar import, were expressed.
(July 30, 1947, ch. 388, 61 Stat. 633.)

§ 6. Limitation of term "products of American fisheries"

Wherever, in the statutes of the United States or in the rulings, regulations, or interpretations of various administrative bureaus and agencies of the United States there appears or may appear the term "products of American fisheries" said term shall not include fresh or frozen fish fillets, fresh or frozen fish steaks, or fresh or frozen slices of fish substantially free of bone (including any of the foregoing divided into sections), produced in a foreign country or its territorial waters, in whole or in part with the use of the labor of persons who are not residents of the United States.
(July 30, 1947, ch. 388, 61 Stat. 634.)

TITLE 2, U.S. CODE—THE CONGRESS

* * * * *

CHAPTER 17A—CONGRESSIONAL BUDGET AND FISCAL OPERATIONS

§ 621. Congressional declaration of purpose

The Congress declares that it is essential—

(1) to assure effective congressional control over the budgetary process;

(2) to provide for the congressional determination each year of the appropriate level of Federal revenues and expenditures;

(3) to provide a system of impoundment control;

(4) to establish national budget priorities; and

(5) to provide for the furnishing of information by the executive branch in a manner that will assist the Congress in discharging its duties.

(Pub. L. 93–344, § 2, July 12, 1974, 88 Stat. 298.)

Explanatory Note

Short Title. Section 1 of Public Law 93-344 approved July 12, 1974, provided that the entire act may be cited as the "Congressional Budget and Impoundment Control Act of 1974." It further provided that titles I-IX, which, among other provisions, established the House and Senate Budget Committees and the Congressional Budget Office, changed the fiscal year from July 1-June 30 to October 1-September 30, and set forth a formal budget process and timetable, may be cited as the "Congressional Budget Act of 1974"; and that title X may be cited as the Impoundment Control Act of 1974. Title X appears in Volume IV in chronological order.

§ 622. Definitions

For purposes of this Act—

(1) The terms "budget outlays" and "outlays" mean, with respect to any fiscal year, expenditures and net lending of funds under budget authority during such year.

(2) The term "budget authority" means authority provided by law to enter into obligations which will result in immediate or future outlays involving Government funds or to collect offsetting receipts, except that such term does not include authority to insure or guarantee the repayment of indebtedness incurred by another person or government.

(3) The term "tax expenditures" means those revenue losses attributable to provisions of the Federal tax laws which allow a special exclusion, exemption, or deduction from gross income or which provide a special credit, a preferential rate of tax, or a deferral of tax liability; and the term "tax expenditures budget" means an enumeration of such tax expenditures.

(4) The term "concurrent resolution on the budget" means—

(A) a concurrent resolution setting forth the congressional budget for the United States Government for a fiscal year as provided in section 632 of this title; and

(B) any other concurrent resolution revising the congressional budget for the United States Government for a fiscal year as described in section 635 of this title.

(5) The term "appropriation Act" means an Act referred to in section 105 of title 1.

(6) The term "deficit" means, with respect to any fiscal year, the amount by which total budget outlays for such fiscal year exceed total revenues for such fiscal year. In calculating the deficit for purposes of comparison with the maximum deficit amount under the Balanced Budget and Emergency Deficit Control Act of 1985 and in calculating the excess deficit for purposes of sections 251 and 252 of such Act [2 U.S.C. 901, 902] (notwithstanding section 911(a) of title 42, for any fiscal year, the receipts of the Federal Old-Age and Survivors Insurance Trust Fund and the Federal Disability Insurance Trust Fund for such fiscal year and the taxes payable under sections 1401(a), 3101(a), and 3111(a) of title 26 during such fiscal year shall be included in total revenues for such fiscal year, and the disbursements of each such Trust Fund for such fiscal year shall be included in total budget outlays for such fiscal year. Notwithstanding any other provision of law except to the extent provided by section 911(a) of title 42, the receipts, revenues, disbursements, budget authority, and outlays of each off-budget Federal entity for a fiscal year shall be included in total budget authority, total budget outlays, and total revenues and the amounts of budget authority and outlays set forth for each major functional category, for such fiscal year. Amounts paid by the Federal Financing Bank for the purchase of loans made or guaranteed by a department, agency, or instrumentality of the Government of the United States shall be treated as outlays of such department, agency, or instrumentality.

(7) The term "maximum deficit amount" means—

(A) with respect to the fiscal year beginning October 1, 1985, $171,900,000,000;

(B) with respect to the fiscal year beginning October 1, 1986, $144,000,000,000;

(C) with respect to the fiscal year beginning October 1, 1987, $108,000,000,000;

(D) with respect to the fiscal year beginning October 1, 1988, $72,000,000,000;

(E) with respect to the fiscal year beginning October 1, 1989, $36,000,000,000; and

(F) with respect to the fiscal year beginning October 1, 1990, zero.

(8) The term "off-budget Federal entity" means any entity (other than a privately-owned Government-sponsored entity)—

(A) which is established by Federal law, and

(B) the receipts and disbursements of which are required by law to be excluded from the totals of—

(i) the budget of the United States Government submitted by the President pursuant to section 1105 of title 31, or

(ii) the budget adopted by the Congress pursuant to subchapter I of this chapter.

(9) The term "entitlement authority" means spending authority described by section 651(c)(2)(C) of this title.

(10) the term "credit authority" means authority to incur direct loan obligations or to incur primary loan guarantee commitments.

(Pub. L. 93–344, § 3, July 12, 1974, 88 Stat. 299; Pub. L. 95–110, § 1, Sept. 20, 1977, 91 Stat. 884; Pub. L. 99–177, title II, §§ 201(a),232(b), Dec. 12, 1985, 99 Stat. 1039,1062.)

EXPLANATORY NOTE

1985 Amendment; Short Title; Popular Name. Public Law 99–177, approved December 12, 1985, added paragraphs (6)–(10). Section 200(a) of Public Law 99–177 provided that title II may be cited as the "Balanced Budget and Emergency Deficit Control Act of 1985," It is popularly known as the Gramm-Rudman-Hollings Act. Only a few selected provisions of the Act appear herein.

* * * * *

SUBCHAPTER I—BUDGET PROCESS

* * * * *

§ 632. Annual adoption of concurrent resolution on the budget

(a) Content of concurrent resolution on the budget

On or before April 15 of each year, the Congress shall complete action on a concurrent resolution on the budget for the fiscal year beginning on October 1 of such year. The concurrent resolution shall set forth appropriate levels for the fiscal year beginning on October 1 of such year, and planning levels for each of the two ensuing fiscal years, for the following—

(1) totals of new budget authority, budget outlays, direct loan obligations, and primary loan guarantee commitments;

(2) total Federal revenues and the amount, if any, by which the aggregate level of Federal revenues should be increased or decreased by bills and resolutions to be reported by the appropriate committees;

(3) the surplus or deficit in the budget;

(4) new budget authority, budget outlays, direct loan obligations, and primary loan guarantee commitments for each major functional category, based on allocations of the total levels set forth pursuant to paragraph (1); and

(5) the public debt.

* * * * *

(Pub. L. 93–344, title III, § 301, July 12, 1974, 88 Stat. 306; Pub. L. 94–

455, title XIX, § 1907(a)(5), Oct. 4, 1976, 90 Stat. 1836; Pub. L. 95–523, title III. §§ 303(a), 304, Oct. 27, 1978, 92 Stat. 1905, 1906; Pub. L. 99–177, title II, § 201(b), Dec. 12, 1985, 99 Stat. 1040.)

* * * * *

§ 635. Permissible revisions of concurrent resolutions on the budget

(a) In general

At any time after the concurrent resolution on the budget for a fiscal year has been agreed to pursuant to section 632 of this title, and before the end of such fiscal year, the two Houses may adopt a concurrent resolution on the budget which revises or reaffirms the concurrent resolution on the budget for such fiscal year most recently agreed to.

(b) Maximum deficit amount may not be exceeded

The provisions of section 632(i) of this title shall apply with respect to concurrent resolutions on the budget under this section (and amendments thereto and conference reports thereon) in the same way they apply to concurrent resolutions on the budget under such section 632(i) of this title (and amendments thereto and conference reports thereon).

(Pub. L. 93–344, title III, § 304, July 12, 1974, 88 Stat. 310; Pub. L. 99–177, title II, § 201(b), Dec. 12, 1985, 99 Stat. 1047.)

* * * * *

§ 641. Reconciliation

(a) Inclusion of reconciliation directives in concurrent resolutions on the budget

A concurrent resolution on the budget for any fiscal year, to the extent necessary to effectuate the provisions and requirements of such resolution, shall—

(1) specify the total amount by which—

(A) new budget authority for such fiscal year;

(B) budget authority initially provided for prior fiscal years;

(C) new entitlement authority which is to become effective during such fiscal year; and

(D) credit authority for such fiscal year,

contained in laws, bills, and resolutions within the jurisdiction of a committee, is to be changed and direct that committee to determine and recommend changes to accomplish a change of such total amount;

(2) specify the total amount by which revenues are to be changed and direct that the committees having jurisdiction to determine and recommend changes in the revenue laws, bills, and resolutions to accomplish a change of such total amount;

(3) specify the amounts by which the statutory limit on the public debt is to be changed and direct the committee having jurisdiction to recommend such change; or

(4) specify and direct any combination of the matters described in paragraphs (1), (2), and (3).

(b) Legislative procedure

If a concurrent resolution containing directives to one or more committees to determine and recommend changes in laws, bills, or resolutions is agreed to in accordance with subsection (a) of this section, and—

(1) only one committee of the House or the Senate is directed to determine and recommend changes, that committee shall promptly make such determination and recommendations and report to its House reconciliation legislation containing such recommendations; or

(2) more than one committee of the House or the Senate is directed to determine and recommend changes, each such committee so directed shall promptly make such determination and recommendations and submit such recommendations to the Committee on the Budget of its House, which, upon receiving all such recommendations, shall report to its House reconciliation legislation carrying out all such recommendations without any substantive revision.

For purposes of this subsection, a reconciliation resolution is a concurrent resolution directing the Clerk of the House of Representatives or the Secretary of the Senate, as the case may be, to make specified changes in bills and resolutions which have not been enrolled.

(c) Compliance with reconciliation directions

Any committee of the House of Representatives or the Senate that is directed, pursuant to a concurrent resolution on the budget, to determine and recommend changes of the type described in paragraphs (1) and (2) of subsection (a) of this section with respect to laws within its jurisdiction, shall be deemed to have complied with such directions—

(1) if—

(A) the amount of the changes of the type described in paragraph (1) of such subsection recommended by such committee do not exceed or fall below the amount of the changes such committee was directed by such concurrent resolution to recommend under such paragraph by more than 20 percent of the total of the amounts of the changes such committee was directed to make under paragraphs (1) and (2) of such subsection; and

(B) the amount of the changes of the type described in paragraph (2) of such subsection recommended by such committee do not exceed or fall below the amount of the changes such committee was directed by such concurrent resolution to recommend under that paragraph by more than 20 percent of the total of the amounts of the changes such committee was directed to make under paragraphs (1) and (2) of such subsection; and

(2) if the total amount of the changes recommended by such committee is not less than the total of the amounts of the changes such committee was directed to make under paragraphs (1) and (2) of such subsection.

(d) Limitation on amendments to reconciliation bills and resolutions

(1) It shall not be in order in the House of Representatives to consider any amendment to a reconciliation bill or reconciliation resolution if such amendment would have the effect of increasing any specific budget outlays above the level of such outlays provided in the bill or resolution (for the fiscal years covered by the reconciliation instructions set forth in the most recently agreed to concurrent resolution on the budget), or would have the effect of reducing any specific Federal revenues below the level of such revenues provided in the bill or resolution (for such fiscal years), unless such amendment makes at least an equivalent reduction in other specific budget outlays, an equivalent increase in other specific Federal revenues, or an equivalent combination thereof (for such fiscal years), except that a motion to strike a provision providing new budget authority or new entitlement authority may be in order.

(2) It shall not be in order in the Senate to consider any amendment to a reconciliation bill or reconciliation resolution if such amendment would have the effect of decreasing any specific budget outlay reductions below the level of such outlay reductions provided (for the fiscal years covered) in the reconciliation instructions which relate to such bill or resolution set forth in a resolution providing for reconciliation, or would have the effect of reducing Federal revenue increases below the level of such revenue increases provided (for such fiscal years) in such instructions relating to such bill or resolution, unless such amendment makes a reduction in other specific budget outlays, an increase in other specific Federal revenues, or a combination thereof (for such fiscal years) at least equivalent to any increase in outlays or decrease in revenues provided by such amendment, except that a motion to strike a provision shall always be in order.

(3) Paragraphs (1) and (2) shall not apply if a declaration of war by the Congress is in effect.

(4) For purposes of this section, the levels of budget outlays and Federal revenues for a fiscal year shall be determined on the basis of estimates made by the Committee on the Budget of the House of Representatives or of the Senate, as the case may be.

(5) The Committee on Rules of the House of Representatives may make in order amendments to achieve changes specified by reconciliation directives contained in a concurrent resolution on the budget if a committee or committees of the House fail to submit recommended changes to its Committee on the Budget pursuant to its instruction.

(e) Procedure in Senate

(1) Except as provided in paragraph (2), the provisions of section 636 of this title for the consideration in the Senate of concurrent resolutions on the budget and conference reports thereon shall also apply to the

consideration in the Senate of reconciliation bills reported under subsection (b) of this section and conference reports thereon.

(2) Debate in the Senate on any reconciliation bill reported under subsection (b) of this section, and all amendments thereto and debatable motions and appeals in connection therewith, shall be limited to not more than 20 hours.

(f) Completion of reconciliation process

(1) In general

Congress shall complete action on any reconciliation bill or reconciliation resolution reported under subsection (b) of this section not later than June 15 of each year.

(2) Point of order in the House of Representatives

It shall not be in order in the House of Representatives to consider any resolution providing for an adjournment period of more than three calendar days during the month of July until the House of Representatives has completed action on the reconciliation legislation for the fiscal year beginning on October 1 of the calendar year to which the adjournment resolution pertains, if reconciliation legislation is required to be reported by the concurrent resolution on the budget for such fiscal year.

(g) Limitation on changes to Social Security Act

Notwithstanding any other provision of law, it shall not be in order in the Senate or the House of Representatives to consider any reconciliation bill or reconsiliation resolution reported pursuant to a concurrent resolution on the budget agreed to under section 632 or 635 of this title, or a resolution pursuant to section 904(b) of this title, or any amendment thereto or conference report thereon, that contains recommendations with respect to the old-age, survivors, and disability insurance program established under title II of the Social Security Act [42 U.S.C. 401 et seq.].

(Pub. L. 93–344, title III, § 310, July 12, 1974, 88 Stat. 315; Pub. L. 99–177, title II, § 201(b), Dec. 12, 1985, 99 Stat. 1053.)

§ 642. New budget authority, new entitlement authority, and revenue legislation to be within appropriate levels

(a) Legislation subject to point of order

Except as provided by subsection (b) of this section, after the Congress has completed action on a concurrent resolution on the budget for a fiscal year, it shall not be in order in either the House of Representatives or the Senate to consider any bill, resolution, or amendment providing new budget authority for such fiscal year, providing new entitlement authority effective during such fiscal year, or reducing revenues for such fiscal year, or any conference report on any such bill or resolution, if—

(1) the enactment of such bill or resolution as reported;

(2) the adoption and enactment of such amendment; or

(3) the enactment of such bill or resolution in the form recommended in such conference report;

would cause the appropriate level of total new budget authority or total budget outlays set forth in the most recently agreed to concurrent resolution on the budget for such fiscal year to be exceeded, or would cause revenues to be less than the appropriate level of total revenues set forth in such concurrent resolution or, in the Senate, would otherwise result in a deficit for such fiscal year that exceeds the maximum deficit amount specified for such fiscal year in section 622(7) of this title (except to the extent that paragraph (1) of section 632(i) of this title or section 635(b) of this title, as the case may be, does not apply by reason of paragraph (2) of such subsection).

(b) Exception in House

Subsection (a) of this section shall not apply in the House of Representatives to any bill, resolution, or amendment which provides new budget authority or new entitlement authority effective during such fiscal year, or to any conference report on any such bill or resolution, if—

(1) the enactment of such bill or resolution as reported;

(2) the adoption and enactment of such amendment; or

(3) the enactment of such bill or resolution in the form recommended in such conference report,

would not cause the appropriate allocation of new discretionary budget authority or new entitlement authority made pursuant to section 633(a) of this title for such fiscal year, for the committee within whose jurisdiction such bill, resolution, or amendment falls, to be exceeded.

(c) Determination of budget levels

For purposes of this section, the levels of new budget authority, budget outlays, new entitlement authority, and revenues for a fiscal year shall be determined on the basis of estimates made by the Committee on the Budget of the House of Representatives or of the Senate, as the case may be.

(Pub. L. 93-344, title III, § 311, July 12, 1974, 88 Stat. 316; Pub. L. 99-177, title II, § 201(b), Dec. 12, 1985, 99 Stat. 1055.)

SUBCHAPTER II—FISCAL PROCEDURES

§ 651. Bills providing new spending authority

(a) Controls on legislation providing spending authority

It shall not be in order in either the House of Representatives or the Senate to consider any bill, resolution, or conference report, as reported to its House which provides new spending authority described in subsection (c)(2)(A) or (B) of this section (or any amendment which provides such new spending authority), unless that bill, resolution, conference report, or amendment also provides that such new spending authority as described in subsection (c)(2)(A) or (B) of this section is to be effective for any fiscal year only to such extent or in such amounts as are provided in appropriation Acts.

(b) Legislation providing entitlement authority

(1) It shall not be in order in either the House of Representatives or the Senate to consider any bill or resolution which provides new spending authority described in subsection (c)(2)(C) of this section (or any amendment which provides such new spending authority) which is to become effective before the first day of the fiscal year which begins during the calendar year in which such bill or resolution is reported.

(2) If any committee of the House of Representatives or the Senate reports any bill or resolution which provides new spending authority described in subsection (c)(2)(C) of this section which is to become effective during a fiscal year and the amount of new budget authority which will be required for such fiscal year if such bill or resolution is enacted as so reported exceeds the appropriate allocation of new budget authority reported under section 633(b) of this title in connection with the most recently agreed to concurrent resolution of the budget for such fiscal year, such bill or resolution shall then be referred to the Committee on Appropriations of that House with instructions to report it, with the committee's recommendations, within 15 calendar days (not counting any day on which that House is not in session) beginning with the day following the day on which it is so referred. If the Committee on Appropriations of either House fails to report a bill or resolution referred to it under this paragraph within such 15-day period, the committee shall automatically be discharged from further consideration of such bill or resolution and such bill or resolution shall be placed on the appropriate calendar.

(3) The Committee on Appropriations of each House shall have jurisdiction to report any bill or resolution referred to it under paragraph (2) with an amendment which limits the total amount of new spending authority provided in such bill or resolution.

(c) Definitions

(1) For purposes of this section, the term "new spending authority" means spending authority not provided by law on the effective date of this Act, including any increase in or addition to spending authority provided by law on such date.

(2) For purposes of paragraph (1), the term "spending authority" means authority (whether temporary or permanent)—

(A) to enter into contracts under which the United States is obligated to make outlays, the budget authority for which is not provided in advance by appropriation Acts;

(B) to incur indebtedness (other than indebtedness incurred under chapter 31 of title 31) for the repayment of which the United States is liable, the budget authority for which is not provided in advance by appropriation Acts;

(C) to make payments (including loans and grants), the budget authority for which is not provided for in advance by appropriations acts, to any person or government if, under the provisions of the law containing such authority, the United States is obligated to make such payments to persons or governments who meet the requirements established by such law;

(D) to forego the collection by the United States of proprietary offsetting receipts, the budget authority for which is not provided in advance by appropriation Acts to offset such foregone receipts; and

(E) to make payments by the United States (including loans, grants, and payments from revolving funds) other than those covered by subparagraph (A), (B), (C), or (D), the budget authority for which is not provided in advance by appropriation Acts.

Such term does not include authority to insure or guarantee the repayment of indebtedness incurred by another person or government.

(d) Exceptions

(1) Subsections (a) and (b) of this section shall not apply to new spending authority if the budget authority for outlays which will result from such new spending authority is derived–

(A) from a trust fund established by the Social Security Act (as in effect on July 12, 1974) [42 U.S.C. 301 et seq.]; or

(B) from any other trust fund, 90 percent or more of the receipts of which consist or will consist of amounts (transferred from the general fund of the Treasury) equivalent to amounts of taxes (related to the purposes for which such outlays are or will be made) received in the Treasury under specified provisions of the Internal Revenue Code of 1954 [26 U.S.C. 1 et seq.].

(2) Subsections (a) and (b) of this section shall not apply to new spending authority which is an amendment to or extension of chapter 67 of title 31, or a continuation of the program of fiscal assistance to State and local governments provided by that chapter, to the extent so provided in the bill or resolution providing such authority.

(3) Subsections (a) and (b) of this section shall not apply to new spending authority to the extent that—

(A) the outlays resulting therefrom are made by an organization which is (i) a mixed-ownership Government corporation (as defined in section 9101(2) of title 31), or (ii) a wholly owned Government corporation (as defined in section 9101(3) of title 31) which is specifically exempted by law from compliance with any or all of the provisions of chapter 91 of title 31, as of December 12, 1985; or

(B) the outlays resulting therefrom consist exclusively of the proceeds of gifts or bequests made to the United States for a specific purpose.

(Pub. L. 93–344, title IV, § 401, July 12, 1974, 88 Stat. 317; Pub. L. 99–177, title II, § 211, Dec. 12, 1985, 99 Stat. 1056.)

§ 652. Legislation providing new credit authority

(a) Controls on legislation providing new credit authority

It shall not be in order in either the House of Representatives or the Senate to consider any bill, resolution, or conference report, as reported to its House, or any amendment which provides new credit authority described in subsection (b)(1) of this section, unless that bill, resolution, conference report, or amendment also provides that such new credit authority is to be effective for any fiscal year only to such extent or in such amounts as are provided in appropriation Acts.

(b) "New credit authority" defined

For purposes of this Act, the term "new credit authority" means credit authority (as defined in section 622(10) of this title) not provided by law on the effective date of this section, including any increase in or addition to credit authority provided by law on such date.
(Pub. L. 93–344, title IV, § 402, July 12, 1974, 88 Stat. 318; Pub. L. 99–177, title II, § 212, Dec. 12, 1985, 99 Stat. 1058.)

* * * * *

§ 655. Off-budget agencies, programs, and activities

(a) Notwithstanding any other provision of law, budget authority, credit authority, and estimates of outlays and receipts for activities of the Federal budget which are off-budget immediately prior to December 12, 1985, not including activities of the Federal Old-Age and Survivors Insurance and Federal Disability Insurance Trust Funds, shall be included in a budget submitted pursuant to section 1105 of title 31 and in a concurrent resolution on the budget reported pursuant to section 632 or section 635 of this title and shall be considered, for purposes of this Act, budget authority, outlays, and spending authority in accordance with definitions set forth in this Act.

(b) All receipts and disbursements of the Federal Financing Bank with respect to any obligations which are issued, sold, or guaranteed by a Federal agency shall be treated as a means of financing such agency for purposes of section 1105 of title 31 and for purposes of this Act.

(Pub. L. 93–344, title IV, § 406, as added Pub. L. 99–177, title II, § 214, Dec. 12, 1985, 99 Stat. 1059.)

TITLE 5, U.S. CODE—GOVERNMENT ORGANIZATION AND EMPLOYEES

This title was enacted by Pub. L. 89-554, § 1, Sept. 6, 1966, 80 Stat. 378

PART I—THE AGENCIES GENERALLY

* * * * *

CHAPTER 3—POWERS

§ 301. Departmental regulations

The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.
(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 379.)

§ 302. Delegation of authority

(a) For the purpose of this section, "agency" has the meaning given it by section 5721 of this title.

(b) In addition to the authority to delegate conferred by other law, the head of an agency may delegate to subordinate officials the authority vested in him—

(1) by law to take final action on matters pertaining to the employment, direction, and general administration of personnel under his agency; and

(2) by section 3702 of title 44 to authorize the publication of advertisements, notices, or proposals.

(Pub. L. 98–554, Sept. 6, 1966, 80 Stat. 379; Pub. L. 94–183, § 2(1), Dec. 31, 1975, 889 Stat. 1057.)

* * * * *

CHAPTER 5—ADMINISTRATIVE PROCEDURE

SUBCHAPTER I—GENERAL PROVISIONS

§ 500. Administrative practice; general provisions

(a) For the purpose of this section—

(1) "agency" has the meaning given it by section 551 of this title; and

(2) "State" means a State, a territory or possession of the United States including a Commonwealth, or the District of Columbia.

(b) An individual who is a member in good standing of the bar of the highest court of a State may represent a person before an agency on filing with the agency a written declaration that he is currently qualified as provided by this subsection and is authorized to represent the particular person in whose behalf he acts.

(c) An individual who is duly qualified to practice as a certified public accountant in a State may represent a person before the Internal Revenue Service of the Treasury Department on filing with that agency a written declaration that he is currently qualified as provided by this subsection and is authorized to represent the particular person in whose behalf he acts.

(d) This section does not—

(1) grant or deny to an individual who is not qualified as provided by subsection (b) or (c) of this section the right to appear for or represent a person before an agency or in an agency proceeding;

(2) authorize or limit the discipline, including disbarment, of individuals who appear in a representative capacity before an agency;

(3) authorize an individual who is a former employee of an agency to represent a person before an agency when the representation is prohibited by statute or regulation; or

(4) prevent an agency from requiring a power of attorney as a condition to the settlement of a controversy involving the payment of money.

(e) Subsections (b)-(d) of this section do not apply to practice before the Patent Office with respect to patent matters that continue to be covered by chapter 3 (sections 31-33) of title 35.

(f) When a participant in a matter before an agency is represented by an individual qualified under subsection (b) or (c) of this section, a notice or other written communication required or permitted to be given the participant in the matter shall be given to the representative in addition to any other service specifically required by statute. When a participant is represented by more than one such qualified representative, service on any one of the representatives is sufficient.

(Added Pub. L. 90–83, § 1(1)(A), Sept. 11, 1967, 81 Stat. 195.)

* * * * *

§ 503. Witness fees and allowances

(a) For the purpose of this section, "agency" has the meaning given it by section 5721 of this title.

(b) A witness is entitled to the fees and allowances allowed by statute for witnesses in the courts of the United States when—

(1) he is subpenaed under section 304(a) of this title; or

(2) he is subpenaed to and appears at a hearing before an agency authorized by law to hold hearings and subpena witnesses to attend the hearings.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 381.)

§ 504. Costs and fees of parties

(a)(1) An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

(2) A party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application which shows that the party is a prevailing party and is eligible to receive an award under this section, and the amount sought, including an itemized statement from any attorney, agent, or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the agency was not substantially justified. When the United States appeals the underlying merits of an adversary adjudication, no decision on an application for fees and other expenses in connection with that adversary adjudication shall be made under this section until a final and unreviewable decision is rendered by the court on the appeal or until the underlying merits of the case have been finally determined pursuant to the appeal.

(3) The adjudicative officer of the agency may reduce the amount to be awarded, or deny an award, to the extent that the party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy. The decision of the adjudicative officer of the agency under this section shall be made a part of the record containing the final decision of the agency and shall include written findings and conclusions and the reason or basis therefor. The decision of the agency on the application for fees and other expenses shall be the final administrative decision under this section.

(b)(1) For the purposes of this section—

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case, and reasonable attorney or agent fees (The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency involved, and (ii) attorney or agent fees shall not be awarded in excess of $75 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies a higher fee.);

(B) "party" means a party, as defined in section 551(3) of this title, who is (i) an individual whose net worth did not exceed $2,000,000 at the time the adversary adjudication was initiated, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the adversary adjudication was initiated, and which had not more than 500 employees at the time the adversary adjudication was initiated; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(a)(c)(3)) exempt from taxation under section 501 of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association;

(C) "adversary adjudication" means (i) an adjudication under section 554 of this title in which the position of the United States is represented by counsel or otherwise, but excludes an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license, and (ii) any appeal of a decision made pursuant to section 6 of the Contract Disputes Act of 1978 (41 U.S.C. 605) before an agency board of contract appeals as provided in section 8 of that Act (41 U.S.C. 607);

(D) "adjudicative officer" means the deciding official, without regard to whether the official is designated as an administrative law judge, a hearing officer or examiner, or otherwise, who presided at the adversary adjudication; and

(E) "position of the agency" means, in addition to the position taken by the agency in the adversary adjudication, the action or failure to act by the agency upon which the adversary adjudication is based; except that fees and other expenses may not be awarded to a party for any portion of the adversary adjudication in which the party has unreasonably protracted the proceedings.

(2) Except as otherwise provided in paragraph (1), the definitions provided in section 551 of this title apply to this section.

(c)(1) After consultation with the Chairman of the Administrative Conference of the United States, each agency shall by rule establish uniform procedures for the submission and consideration of applications for an award of fees and other expenses. If a court reviews the underlying decision of the adversary adjudication, an award for fees and other expenses may be made only pursuant to section 2412(d)(3) of title 28, United States Code.

(2) If a party other than the United States is dissatisfied with a determination of fees and other expenses made under subsection (a), that party may, within 30 days after the determination is made, appeal the determination to the court of the United States having jurisdiction to review the merits of the underlying decision of the agency adversary adjudication. The court's determination on any appeal heard under this paragraph shall be based solely on the factual record made before the agency. The court may modify the determination of fees and other expenses only if the court finds

that the failure to make an award of fees and other expenses, or the calculation of the amount of the award, was unsupported by substantial evidence.

(d) Fees and other expenses awarded under this subsection shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise.

(e) The Chairman of the Administrative Conference of the United States, after consultation with the Chief Counsel for Advocacy of the Small Business Administration, shall report annually to the Congress on the amount of fees and other expenses awarded during the preceding fiscal year pursuant to this section. The report shall describe the number, nature, and amount of the awards, the claims involved in the controversy, and any other relevant information which may aid the Congress in evaluating the scope and impact of such awards. Each agency shall provide the Chairman with such information as is necessary for the Chairman to comply with the requirements of this subsection.

(Added Pub. L. 96–481, title II, § 203(a)(1), (c), Oct. 21, 1980, 94 Stat. 2325, 2327; revived and amended Pub. L. 99–80, §§ 1, 6, Aug. 5, 1985, 99 Stat. 183, 186.)

EXPLANATORY NOTE

Short Title. Section 201 of Public Law 96–481, 94 Stat. 2325, provided that title II, which enacted this section and section 2412 of title 28 of the U.S. Code, may be cited as the "Equal Access to Justice Act." 28 U.S.C. § 2412 appears in this appendix.

SUBCHAPTER II—ADMINISTRATIVE PROCEDURE

§ 551. Definitions

For the purpose of this subchapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

or except as to the requirements of section 552 of this title—

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891–1902, and former section 1641(b)(2), of title 50, appendix;

(2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3) "party" includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

(10) "sanction" includes the whole or a part of an agency—

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(B) withholding of relief;

(C) imposition of penalty or fine;

(D) destruction, taking, seizure, or withholding of property;

(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

(F) requirement, revocation, or suspension of a license; or

(G) taking other compulsory or restrictive action;

(11) "relief" includes the whole or a part of an agency—

(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

(B) recognition of a claim, right, immunity, privilege, exemption, or exception; or

(C) taking of other action on the application or petition of, and beneficial to, a person;

(12) "agency proceeding" means an agency process as defined by paragraphs (5), (7), and (9) of this section;

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; and

(14) "ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 381; Pub. L. 94–409, § 4(b), Sept. 13, 1976, 90 Stat. 1247.)

EXPLANATORY NOTES

Popular Name. The provisions of sections 551 to 559 and 701 to 706 of title 5 derive from the Act of June 11, 1946, 60 Stat. 237, which is popularly known as the Administrative Procedure Act.

1977 Amendment. Section 4(b) of the Act of September 13, 1976, Public Law 94–409, 90 Stat. 1247, added the definition of "ex-parte communication" in paragraph 14.

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as proved by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4)(A) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all constituent units of such agency. Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

(C) Notwithstanding any other provision or law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

(D) [Case precedence on docket.]—*Repealed.* (Pub. L. 98–620, title IV, § 402(2), Nov. 8, 1984, 98 Stat. 3357)

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(B) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request—

(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(b) This section does not apply to matters that are—

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(d) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of the House of Representatives and President of the Senate for referral to the appropriate committees of the Congress. The report shall include—

(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(2) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

(4) the results of each proceeding conducted pursuant to subsection (a)(4)(F), including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;

(5) a copy of every rule made by such agency regarding this section;

(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

(7) such other information as indicates efforts to administer fully this section.

The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsections (a)(4)(E), (F), and (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(e) For purposes of this section, the term "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency. (Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 383; Pub. L. 90–23, § 1, June 5, 1967, 81 Stat. 54; Pub. L. 93–502, §§ 1–3, Nov. 21, 1974, 88 Stat. 1561–1564; Pub. L. 94–409, § 5(b), Sept. 13, 1976, 90 Stat. 1247; Pub. L. 95–454, title IX, § 906(a)(10), Oct. 13, 1978, 92 Stat. 1225; Pub. L. 98–620, title IV, § 402(2), Nov. 8, 1984, 98 Stat. 3357.)

EXPLANATORY NOTES

Popular Name. This section is popularly known as the Freedom of Information Act (FOIA).

Reference in the Text. The Special Counsel, referred to in section 552(a)(4)(F) of the text, is the holder of a position established by the Civil Service Reform Act of 1978, in connection with the Merit Systems Protection Board, with the responsibility, among others, of investigating allegations of mismanagement and of prohibited personnel practices. Provisions relating to the appointment and functions of the Special Counsel are found in 5 U.S.C. § 1204–09. Those sections do not appear herein.

§ 552a. Records maintained on individuals

(a) Definitions

For Purposes of this section—

(1) the term "agency" means agency as defined in section 552(e) of this title;

(2) the term "individual" means a citizen of the United States or an alien lawfully admitted for permanent residence;

(3) the term "maintain" includes maintain, collect, use, or disseminate;

(4) the term "record" means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;

(5) the term "system of records" means a group of any records under the control of any agency from which information is retrieved by the

name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual;

(6) the term "statistical record" means a record in a system of records maintained for statistical research or reporting purposes only and not used in whole or in part in making any determination about an identifiable individual, except as provided by section 8 of title 13; and

(7) the term "routine use" means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected.

(b) Conditions of disclosure

No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be—

(1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;

(2) required under section 552 of this title;

(3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;

(4) to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13;

(5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

(6) to the National Archives and Records Administration as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Archivist of the United States or the designee of the Archivist to determine whether the record has such value;

(7) to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;

(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;

(9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;

(10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the General Accounting Office;

(11) pursuant to the order of a court of competent jurisdiction; and

(12) to a consumer reporting agency in accordance with section 3711(f) of title 31.

(c) Accounting of certain disclosures

Each agency, with respect to each system of records under its control shall—

(1) except for disclosures made under subsections (b)(1) or (b)(2) of this section, keep an accurate accounting of—

(A) the date, nature, and purpose of each disclosure of a record to any person or to another agency made under subsection (b) of this section; and

(B) the name and address of the person or agency to whom the disclosure is made;

(2) retain the accounting made under paragraph (1) of this subsection for at least five years or the life of the record, whichever is longer, after the disclosure for which the accounting is made;

(3) except for disclosures made under subsection (b)(7) of this section, make the accounting made under paragraph (1) of this subsection available to the individual named in the record at his request; and

(4) inform any person or other agency about any correction or notation of dispute made by the agency in accordance with subsection (d) of this section of any record that has been disclosed to the person or agency if an accounting of the disclosure was made.

(d) Access to records

Each Agency that maintains a system of records shall—

(1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence;

(2) permit the individual to request amendment of a record pertaining to him and—

(A) not later than 10 days (excluding Saturdays, Sundays, and legal public holidays) after the date of receipt of such request, acknowledge in writing such receipt; and

(B) promptly, either—

(i) make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete; or

(ii) inform the individual of its refusal to amend the record in accordance with his request, the reason for the refusal, the procedures established by the agency for the individual to request a review of that refusal by the head of the agency or an officer designated by the head of the agency, and the name and business address of that official;

(3) permit the individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal, and not later than 30 days (excluding Saturdays, Sundays, and legal public holidays) from the date on which the individual requests such review, complete such review and make a final determination unless, for good cause shown, the head of the agency extends such 30-day period; and if, after his review, the reviewing official also refuses to amend the record in accordance with the request, permit the individual to file with the agency a concise statement setting forth the reasons for his disagreement with the refusal of the agency, and notify the individual of the provisions for judicial review of the reviewing official's determination under subsection (g)(1)(A) of this section;

(4) in any disclosure, containing information about which the individual has filed a statement of disagreement, occurring after the filing of the statement under paragraph (3) of this subsection, clearly note any portion of the record which is disputed and provide copies of the statement and, if the agency deems it appropriate, copies of a concise statement of the reasons of the agency for not making the amendments requested, to persons or other agencies to whom the disputed record has been disclosed; and

(5) nothing in this section shall allow an individual access to any information compiled in resonable anticipation of a civil action or proceeding.

(e) Agency requirements

Each agency that maintains a system of records shall—

(1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President;

(2) collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs;

(3) inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual—

(A) the authority (whether granted by statute, or by executive order of the President) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary;

(B) the principal purpose or purposes for which the information is intended to be used;

(C) the routine uses which may be made of the information, as published pursuant to paragraph (4)(D) of this subsection; and

(D) the effects on him, if any, of not providing all or any part of the requested information;

(4) subject to the provisions of paragraph (11) of this subsection, publish in the Federal Register upon establishment or revision a notice of the existence and character of the system of records, which notice shall include—

(A) the name and location of the system;

(B) the categories of individuals on whom records are maintained in the system;

(C) the categories of records maintained in the system;

(D) each routine use of the records contained in the system, including the categories of users and the purpose of such use;

(E) the policies and practices of the agency regarding storage, retrievability, access controls, retention, and disposal of the records;

(F) the title and business address of the agency official who is responsible for the system of records;

(G) the agency procedures whereby an individual can be notified at his request if the system of records contains a record pertaining to him;

(H) the agency procedures whereby an individual can be notified at his request how he can gain access to any record pertaining to him contained in the system of records, and how he can contest its content; and

(I) the categories of sources of records in the system;

(5) maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination;

(6) prior to disseminating any record about an individual to any person other than an agency, unless the dissemination is made pursuant to subsection (b)(2) of this section, make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes;

(7) maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity;

(8) make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record;

(9) establish rules of conduct for persons involved in the design, development, operation, or maintenance of any system of records, or in maintaining any record, and instruct each such person with respect to such rules and the requirements of this section, including any other rules and procedures adopted pursuant to this section and the penalties for noncompliance;

(10) establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained; and

(11) at least 30 days prior to publication of information under paragraph (4)(D) of this subsection, publish in the Federal Register notice of any new use or intended use of the information in the system, and provide an opportunity for interested persons to submit written data, views, or arguments to the agency.

(f) Agency rules

In order to carry out the provisions of this section, each agency that maintains a system of records shall promulgate rules, in accordance with the requirements (including general notice) of section 553 of this title, which shall—

(1) establish procedures whereby an individual can be notified in response to his request if any system of records named by the individual contains a record pertaining to him;

(2) define reasonable times, places, and requirements for identifying an individual who requests his record or information pertaining to him before the agency shall make the record or information available to the individual;

(3) establish procedures for the disclosure to an individual upon his request of his record or information pertaining to him, including special procedure, if deemed necessary, for the disclosure to an individual of medical records, including psychological records pertaining to him;

(4) establish procedures for reviewing a request from an individual concerning the amendment of any record or information pertaining to the individual, for making a determination on the request, for an appeal within the agency of an initial adverse agency determination, and for whatever additional means may be necessary for each individual to be able to exercise fully his rights under this section; and

(5) establish fees to be charged, if any, to any individual for making copies of his record, excluding the cost of any search for and review of the record.

The Office of the Federal Register shall annually compile and publish the rules promulgated under this subsection and agency notices published under subsection (e)(4) of this section in a form available to the public at low cost.

(g)(1) Civil remedies

Whenever any agency

(A) makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;

(B) refuses to comply with an individual request under subsection (d)(1) of this section;

(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or

(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

(2)(A) In any suit brought under the provisions of subsection (g)(1)(A) of this section, the court may order the agency to amend the individual's record in accordance with his request or in such other way as the court may direct. In such a case the court shall determine the matter de novo.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(3)(A) In any suit brought under the provisions of subsection (g)(1)(B) of this section, the court may enjoin the agency from withholding the records and order the production to the complainant of any agency records improperly withheld from him. In such a case the court shall determine the matter de novo, and may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this section, and the burden is on the agency to sustain its action.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of—

(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and

(B) the costs of the action together with reasonable attorney fees as determined by the court.

(5) An action to enforce any liability created under this section may be brought in the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, without regard to the amount in controversy, within two years from the date on which the cause of action arises, except that where an agency has materially and willfully misrepresented any information required under this section to be disclosed to an individual and the information so misrepresented is

material to establishment of the liability of the agency to the individual under this section, the action may be brought at any time within two years after discovery by the individual of the misrepresentation. Nothing in this section shall be construed to authorize any civil action by reason of any injury sustained as the result of a disclosure of a record prior to September 27, 1975.

(h) Rights of legal guardians

For the purposes of this section, the parent of any minor, or the legal guardian of any individual who has been declared to be incompetent due to physical or mental incapacity or age by a court of competent jurisdiction, may act on behalf of the individual.

(i)(1) Criminal penalties

Any officer or employee of an agency, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by this section or by rules or regulations established thereunder, and who knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than $5,000.

(2) Any officer or employee of any agency who willfully maintains a system of records without meeting the notice requirements of subsection (e)(4) of this section shall be guilty of a misdemeanor and fined not more than $5,000.

(3) Any person who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses shall be guilty of a misdemeanor and fined not more than $5,000.

(j) General exemptions

The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from any part of this section except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i) if the system of records is—

(1) maintained by the Central Intelligence Agency; or

(2) maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B)

information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

(k) Specific exemptions

The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from subsections (c)(3), (d), (e)(1), (e)(4)(G), (H), and (I) and (f) of this section if the system of records is—

(1) subject to the provisions of section 552(b)(1) of this title;

(2) investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2) of this section: *Provided, however,* That if any individual is denied any right, privilege, or benefit that he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material, such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(3) maintained in connection with providing protective services to the President of the United States or other individuals pursuant to section 3056 of title 18;

(4) required by statute to be maintained and used solely as statistical records;

(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(6) testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service the disclosure of which would compromise the objectivity or fairness of the testing or examination process; or

(7) evaluation material used to determine potential for promotion in the armed services, but only to the extent that the disclosure of such

material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

(*l*)(1) Archival records

(1) Each agency record which is accepted by the Archivist of the United States for storage, processing, and servicing in accordance with section 3103 of title 44 shall, for the purposes of this section, be considered to be maintained by the agency which deposited the record and shall be subject to the provisions of this section. The Archivist of the United States shall not disclose the record except to the agency which maintains the record, or under rules established by that agency which are not inconsistent with the provisions of this section.

(2) Each agency record pertaining to an identifiable individual which was transferred to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, prior to the effective date of this section, shall, for the purposes of this section, be considered to be maintained by the National Archives and shall not be subject to the provisions of this section, except that a statement generally describing such records (modeled after the requirements relating to records subject to subsections (e)(4)(A) through (G) of this section) shall be published in the Federal Register.

(3) Each agency record pertaining to an identifiable individual which is transferred to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, on or after the effective date of this section, shall, for the purposes of this section, be considered to be maintained by the National Archives and shall be exempt from the requirements of this section except subsections (e)(4)(A) through (G) and (e)(9) of this section.

(m) Government contractors

(1) When an agency provides by a contract for the operation by or on behalf of the agency of a system of records to accomplish an agency function, the agency shall, consistent with its authority, cause the requirements of this section to be applied to such system. For purposes of subsection (i) of this section any such contractor and any employee of such contractor, if such contract is agreed to on or after the effective date of this section, shall be considered to be an employee of an agency.

(2) A consumer reporting agency to which a record is disclosed under section 3711(f) of title 31 shall not be considered a contractor for the purposes of this section.

(n) Mailing lists

An individual's name and address may not be sold or rented by an agency unless such action is specifically authorized by law. This provision shall not be construed to require the withholding of names and addresses otherwise permitted to be made public.

(o) Report on new systems

Each agency shall provide adequate advance notice to Congress and the Office of Management and Budget of any proposal to establish or alter any system of records in order to permit an evaluation of the probable or potential effect of such proposal on the privacy and other personal or property rights of individuals or the disclosure of information relating to such individuals, and its effect on the preservation of the constitutional principles of federalism and separation of powers.

(p) Annual report

The President shall annually submit to the Speaker of the House of Representatives and the President pro tempore of the Senate a report—

(1) describing the actions of the Director of the Office of Management and Budget pursuant to section 6 of the Privacy Act of 1974 during the preceding year;

(2) describing the exercise of individual rights of access and amendment under this section during such year;

(3) identifying changes in or additions to systems of records;

(4) containing such other information concerning administration of this section as may be necessary or useful to the Congress in reviewing the effectiveness of this section in carrying out the purposes of the Privacy Act of 1974.

(q) Effect of other laws

(1) No agency shall rely on any exemption contained in section 552 of this title to withhold from an individual any record which is otherwise accessible to such individual under the provisions of this section.

(2) No agency shall rely on any exemption in this section to withhold from an individual any record which is otherwise accessible to such individual under the provisions of section 552 of this title.

(Added Pub. L. 93–579, § 3, Dec. 31, 1974, 88 Stat. 1897, and amended Pub. L. 94–183, § 2(2), Dec. 31, 1975, 89 Stat. 1057; Pub. L. 97–365, § 2, Oct. 25, 1982, 96 Stat. 1749; Pub. L. 97–375, title II, § 201(a), (b), Dec. 21, 1982, 96 Stat. 1821; Pub. L. 97–452, § 2(a)(1), Jan. 12, 1983, 96 Stat. 2478; Pub. L. 98–477, § 2(c), Oct. 15, 1984, 98 Stat. 2211; Pub. L. 98–497, title I, § 107(g), Oct. 19, 1984, 98 Stat. 2292.)

EXPLANATORY NOTE

Short Title. Section 1 of the Act of December 31, 1974, Public Law 93–579, from which this section derives, provided that it may be referred to as the "Privacy Act of 1974."

* * * * *

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 383.)

EXPLANATORY NOTE

DOE Not Exempted. Section 501(b)(3) of the Department of Energy Organization Act, approved August 4, 1977, excludes the Department of Energy from the exemption in subsection 553(a)(2) from the rulemaking provisions of section 553. Extracts from the 1977 Act, including section 501(b)(3), appear in Volume IV in chronological order.

§ 554. Adjudications

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved—

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except an administrative law judge appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of—

(1) the time, place, and nature of the hearings;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for—

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply—

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(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 384; Pub. L. 95–251, § 2(a)(1), Mar. 27, 1978, 92 Stat. 183.)

§ 555. Ancillary matters

(a) This section applies, according to the provisions thereof, except as otherwise provided by this subchapter.

(b) A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding. So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function. With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it. This subsection does not grant or deny a person who is not a lawyer the right to appear for or represent others before an agency or in an agency proceeding.

(c) Process, requirement of a report, inspection, or other investigative act or demand may not be issued, made, or enforced except as authorized by law. A person compelled to submit data or evidence is entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

(d) Agency subpenas authorized by law shall be issued to a party on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought. On contest, the court shall sustain the subpena or similar process or demand to the extent that it is found to be in accordance with law. In a proceeding for enforcement, the court shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

(e) Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceedings. Except in affirming a prior

denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.
(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 385).

§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence—

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more administrative law judges appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may—

(1) administer oaths and affirmations;

(2) issue subpenas authorized by law;

(3) rule on offers of proof and receive relevant evidence;

(4) take depositions or have depositions taken when the ends of justice would be served;

(5) regulate the course of the hearing;

(6) hold conferences for the settlement or simplification of the issues by consent of the parties;

(7) dispose of procedural requests or similar matters;

(8) make or recommend decisions in accordance with section 557 of this title; and

(9) take other action authorized by agency rule consistent with this subchapter.

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur. A party is entitled to present his case or defense by oral or documentary evidence to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determing claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 386; Pub. L. 94–409, § 4(c), Sept. 13, 1976, 90 Stat. 1247; Pub. L. 95–251, § 2(a)(1), Mar. 27, 1978, 92 Stat. 183.)

§ 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall first recommend a decision, except that in rule making or determining applications for initial licenses—

(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or

(2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

(d)(1) In any agency proceeding which is subject to subsection (a) of this section except to the extent required for the disposition of ex parte matters as authorized by law—

(A) no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication relevant to the merits of the proceeding;

(B) no member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or knowingly cause to be made to any interested person outside the agency an ex parte communication relevant to the merits of the proceeding;

(C) a member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of such proceeding who receives, or who makes or knowingly causes to be made, a communication prohibited by this subsection shall place on the public record of the proceeding:

(i) all such written communications;

(ii) memoranda stating the substance of all such oral communications; and

(iii) all written responses, and memoranda stating the substance of all oral responses, to the materials described in clauses (i) and (ii) of this subparagraph;

(D) upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of this subsection, the agency, administrative law judge, or other employee presiding at the hearing may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation; and

(E) the prohibitions of this subsection shall apply beginning at such time as the agency may disignate, but in no case shall they begin to apply later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his acquisition of such knowledge.

(2) This subsection does not constitute authority to withhold information from Congress.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 837; Pub. L. 94–409, § 4(a), Sept. 13, 1976, 90 Stat. 1246.)

EXPLANATORY NOTE

1976 Amendment Section 4(a) of the Act of September 13, 1976, Public Law 94–409, 90 Stat. 1246, added subsection (d) dealing with ex parte communications.

§ 558. Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses

(a) This section applies, according to the provisions thereof, to the exercise of a power or authority.

(b) A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.

(c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given—

(1) notice by the agency in writing of the facts or conduct which may warrant the action; and

(2) opportunity to demonstrate or achieve compliance with all lawful requirements.

When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 388.)

§ 559. Effect on other laws; effect of subsequent statute

This subchapter, chapter 7, and sections 1305, 3105, 3344, 4301(2)(E), 5372, and 7521 of this title, and the provisions of section 5335(a)(B) of this title that relate to administrative law judges, do not limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, requirements or privileges relating to evidence or procedure apply equally to agencies and persons. Each agency is granted the authority necessary to comply with the requirements of this subchapter through the issuance of rules or otherwise. Subsequent statute may not be

held to supersede or modify this subchapter, chapter 7, sections 1305, 3105, 3344, 4301(2)(E), 5372, or 7521 of this title, or the provisions of section 5335(a)(B) of this title that relate to administrative law judges, except to the extent that it does so expressly.
(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 388; Pub. L. 90–623, § 1(1), Oct. 22, 1968, 82 Stat. 1312; Pub. L. 95–251, § 2(a)(1), Mar. 27, 1978, 92 Stat. 183; Pub. L. 95–454, title VIII, § 801 (a)(3)(B)(iii), Oct. 13, 1978, 92 Stat. 1221.)

* * * * *

CHAPTER 6—THE ANALYSIS OF REGULATORY FUNCTIONS

§ 601. Definitions

For purposes of this chapter—

(1) the term "agency" means an agency as defined in section 551(1) of this title;

(2) the term "rule" means any rule for which the agency publishes a general notice of proposed rulemaking pursuant to section 553(b) of this title, or any other law, including any rule of general applicability governing Federal grants to State and local governments for which the agency provides an opportunity for notice and public comment, except that the term "rule" does not include a rule of particular applicability relating to rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services, or allowances therefor or to valuations, costs or accounting, or practices relating to such rates, wages, structures, prices, appliances, services, or allowances;

(3) the term "small business" has the same meaning as the term "small business concern" under section 3 of the Small Business Act, unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register;

(4) the term "small organization" means any not-for-profit enterprise which is independently owned and operated and is not dominant in its field, unless an agency establishes, after opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register;

(5) the term "small governmental jurisdiction" means governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand, unless an agency establishes, after opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and which are based on such factors as location in rural or sparsely pop-

ulated areas or limited revenues due to the population of such jurisdiction, and publishes such definition(s) in the Federal Register; and

(6) the term "small entity" shall have the same meaning as the terms "small business", "small organization" and "small governmental jurisdiction" defined in paragraphs (3), (4) and (5) of this section.

(Added Pub. L. 96-354, § 3(a), Sept. 19, 1980, 94 Stat. 1165.)

EXPLANATORY NOTE

Short Title. Section 1 of Public Law 96-354, approved September 19, 1980, provides that the Act, from which 5 U.S.C. § § 601-612 are derived, may be cited as the "Regulatory Flexibility Act."

§ 602. Regulatory agenda

(a) During the months of October and April of each year, each agency shall publish in the Federal Register a regulatory flexibility agenda which shall contain—

(1) a brief description of the subject area of any rule which the agency expects to propose or promulgate which is likely to have a significant economic impact on a substantial number of small entities;

(2) a summary of the nature of any such rule under consideration for each subject area listed in the agenda pursuant to paragraph (1), the objectives and legal basis for the issuance of the rule, and an approximate schedule for completing action on any rule for which the agency has issued a general notice of proposed rulemaking; and

(3) the name and telephone number of an agency official knowledgeable concerning the items listed in paragraph (1).

(b) Each regulatory flexibility agenda shall be transmitted to the Chief Counsel for Advocacy of the Small Business Administration for comment, if any.

(c) Each agency shall endeavor to provide notice of each regulatory flexibility agenda to small entities or their representatives through direct notification or publication of the agenda in publications likely to be obtained by such small entities and shall invite comments upon each subject area on the agenda.

(d) Nothing in this section precludes an agency from considering or acting on any matter not included in a regulatory flexibility agenda, or requires an agency to consider or act on any matter listed in such agenda.

(Added Pub. L. 96-354, § 3(a), Sept. 19, 1980, 94 Stat. 1166.)

§ 603. Initial regulatory flexibility analysis

(a) Whenever an agency is required by section 553 of this title, or any other law, to publish general notice of proposed rulemaking for any proposed rule, the agency shall prepare and make available for public comment an initial regulatory flexibility analysis. Such analysis shall describe the impact of the proposed rule on small entities. The initial regulatory flexibility analysis or a summary shall be published in the Federal Register at the time of the publication of general notice of proposed rulemaking for the rule.

The agency shall transmit a copy of the initial regulatory flexibility analysis to the Chief Counsel for Advocacy of the Small Business Administration.

(b)Each initial regulatory flexibility analysis required under this section shall contain—

(1) a description of the reasons why action by the agency is being considered;

(2) a succinct statement of the objectives of, and legal basis for, the proposed rule;

(3) a description of and, where feasible, and estimate of the number of small entities to which the proposed rule will apply;

(4) a description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;

(5) an identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule.

(c) Each initial regulatory flexibility analysis shall also contain a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities. Consistent with the stated objectives of applicable statutes, the analysis shall discuss significant alternatives such as—

(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;

(2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities;

(3) the use of performance rather than design standards; and

(4) an exemption from coverage of the rule, or any part thereof, for such small entities.

(Added Pub. L. 96–354, § 3(a), Sept. 19, 1980, 94 Stat. 1166.)

§ 604. Final regulatory flexibility analysis

(a) When an agency promulgates a final rule under section 553 of this title, after being required by that section or any other law to publish a general notice of proposed rulemaking, the agency shall prepare a final regulatory flexibility analysis. Each final regulatory flexibility analysis shall contain—

(1) a succinct statement of the need for, and the objectives of, the rule;

(2) a summary of the issues raised by the public comments in response to the initial regulatory flexibility analysis, a summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments; and

(3) a description of each of the significant alternatives to the rule consistent with the stated objectives of applicable statutes and designed to minimize any significant economic impact of the rule on small entities

which was considered by the agency, and a statement of the reasons why each one of such alternatives was rejected.

(b) The agency shall make copies of the final regulatory flexibility analysis available to members of the public and shall publish in the Federal Register at the time of publication of the final rule under section 553 of this title a statement describing how the public may obtain such copies.

(Added Pub. L. 96–354, § 3(a), Sept. 19, 1980, 94 Stat. 1167.)

§ 605. Avoidance of duplicative or unnecessary analyses

(a) Any Federal agency may perform the analyses required by section 602, 603, and 604 of this title in conjunction with or as a part of any other agenda or analysis required by any other law if such other analysis satisfies the provisions of such sections.

(b) Sections 603 and 604 of this title shall not apply to any proposed or final rule if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. If the head of the agency makes a certification under the preceding sentence, the agency shall publish such certification in the Federal Register, at the time of publication of general notice of proposed rulemaking for the rule or at the time of publication of the final rule, along with a succinct statement explaining the reasons for such certification, and provide such certification and statement to the Chief Counsel for Advocacy of the Small Business Administration.

(c) In order to avoid duplicative action, an agency may consider a series of closely related rules as one rule for the purposes of sections 602, 603, 604 and 610 of this title.

(Added Pub. L. 96–354, § 3(a), Sept. 19, 1980, 94 Stat. 1167.)

§ 606. Effect on other law

The requirements of sections 603 and 604 of this title do not alter in any manner standards otherwise applicable by law to agency action.

(Added Pub. L. 96–354, § 3(a), Sept. 19, 1980, 94 Stat. 1168.)

§ 607. Preparation of analyses

In complying with the provisions of sections 603 and 604 of this title, an agency may provide either a quantifiable or numerical description of the effects of a proposed rule or alternatives to the proposed rule, or more general descriptive statements if quantification is not practicable or reliable.

(Added Pub. L. 96–354, § 3(a), Sept. 19, 1980, 94 Stat. 1168.)

§ 608. Procedure for waiver or delay of completion

(a) An agency head may waive or delay the completion of some or all of the requirements of section 603 of this title by publishing in the Federal Register, not later than the date of publication of the final rule, a written finding, with reasons therefor, that the final rule is being promulgated in response to an emergency that makes compliance or timely compliance with the provisions of section 603 of this title impracticable.

(b) Except as provided in section 605(b), an agency head may not waive the requirements of section 604 of this title. An agency head may delay the completion of the requirements of section 604 of this title for a period of not more than one hundred and eighty days after the date of publication in the Federal Register of a final rule by publishing in the Federal Register, not later than such date of publication, a written finding, with reasons therefor, that the final rule is being promulgated in response to an emergency that makes timely compliance with the provisions of section 604 of this title impracticable. If the agency has not prepared a final regulatory analysis pursuant to section 604 of this title within one hundred and eighty days from the date of publication of the final rule, such rule shall lapse and have no effect. Such rule shall not be repromulgated until a final regulatory flexibility analysis has been completed by the agency.
(Added Pub. L. 96–354, § 3(a), Sept. 19, 1980, 94 Stat. 1168.)

§ 609. Procedures for gathering comments

When any rule is promulgated which will have a significant economic impact on a substantial number of small entities, the head of the agency promulgating the rule or the official of the agency with statutory responsibility for the promulgation of the rule shall assure that small entities have been given an opportunity to participate in the rulemaking for the rule through techniques such as—

(1) the inclusion in an advanced notice of proposed rulemaking, if issued, of a statement that the proposed rule may have a significant economic effect on a substantial number of small entities;

(2) the publication of general notice of proposed rulemaking in publications likely to be obtained by small entities;

(3) the direct notification of interested small entities;

(4) the conduct of open conferences or public hearings concerning the rule for small entities; and

(5) the adoption or modification of agency procedural rules to reduce the cost or complexity of participation in the rulemaking by small entities.

(Added Pub. L. 96–354, § 3(a), Sept. 19, 1980, 94 Stat. 1168.)

§ 610. Periodic review of rules

(a) Within one hundred and eighty days after the effective date of this chapter, each agency shall publish in the Federal Register a plan for the periodic review of the rules issued by the agency which have or will have a significant economic impact upon a substantial number of small entities. Such plan may be amended by the agency at any time by publishing the revision in the Federal Register. The purpose of the review shall be to determine whether such rules should be continued without change, or should be amended or rescinded, consistent with the stated objectives of applicable statutes, to minimize any significant economic impact of the rules upon a substantial number of such small entities. The plan shall provide for the review of all such agency rules existing on the effective date of this chapter within ten years of that date and for the review of such rules adopted after the effective date of this chapter within ten years of the publication of such rules as the final rule. If the head of the agency determines that completion of the review of existing rules is not feasible by the established date, he shall so certify in a statement published in the Federal Register and may extend the completion date by one year at a time for a total of not more than five years.

(b) In reviewing rules to minimize any significant economic impact of the rule on a substantial number of small entities in a manner consistent with the stated objectives of applicable statutes, the agency shall consider the following factors—

(1) the continued need for the rule;

(2) the nature of complaints or comments received concerning the rule from the public;

(3) the complexity of the rule;

(4) the extent to which the rule overlaps, duplicates or conflicts with other Federal rules, and, to the extent feasible, with State and local governmental rules; and

(5) the length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule.

(c) Each year, each agency shall publish in the Federal Register a list of the rules which have a significant economic impact on a substantial number of small entities, which are to be reviewed pursuant to this section during the succeeding twelve months. The list shall include a brief description of each rule and the need for and legal basis of such rule and shall invite public comment upon the rule.

(Added Pub. L. 96–354, § 3(a), Sept. 19, 1980, 94 Stat. 1169.)

§ 611. Judicial review

(a) Except as otherwise provided in subsection (b), any determination by an agency concerning the applicability of any of the provisions of this chapter to any action of the agency shall not be subject to judicial review.

(b) Any regulatory flexibility analysis prepared under sections 603 and 604 of this title and the compliance or noncompliance of the agency with the provisions of this chapter shall not be subject to judicial review. When an action for judicial review of a rule is instituted, any regulatory flexibility analysis for such rule shall constitute part of the whole record of agency action in connection with the review.

(c) Nothing in this section bars judicial review of any other impact statements or similar analysis required by any other law if judicial review of such statement or analysis is otherwise provided by law.

(Added Pub. L. 96–354, § 3(a), Sept. 19, 1980, 94 Stat. 1169.)

§ 612. Reports and intervention rights

(a) The Chief Counsel for Advocacy of the Small Business Administration shall monitor agency compliance with this chapter and shall report at least annually thereon to the President and to the Committees of the Judiciary of the Senate and House of Representatives, the Select Committee on Small Business of the Senate, and the Committee on Small Business of the House of Representatives.

(b) The Chief Counsel for Advocacy of the Small Business Administration is authorized to appear as amicus curiae in any action brought in a court of the United States to review a rule. In any such action, the Chief Counsel is authorized to present his views with respect to the effect of the rule on small entities.

(c) A court of the United States shall grant the application of the Chief Counsel for Advocacy of the Small Business Administration to appear in any such action for the purposes described in subsection (b).

(Added Pub. L. 96–354, § 3(a), Sept. 19, 1980, 94 Stat. 1170.)

CHAPTER 7—JUDICIAL REVIEW

§ 701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

"agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891–1902, and former section 1641(b)(2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392.)

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the

United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392; Pub. L. 94–574, § 1, Oct. 21, 1976, 90 Stat. 2721.)

EXPLANATORY NOTE

1976 Amendment. The Act of October 21, 1976, Public Law 94–574, 90 Stat. 2721, removed the defense of sovereign immunity as a bar to judicial review of Federal administrative action otherwise subject to judicial review.

§ 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392; Pub. L. 94–574, § 1, Oct. 21, 1976, 90 Stat. 2721.)

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsiderations, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392.)

§ 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.
(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393)

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.
(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

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PART III—EMPLOYEES

Subpart A—General Provisions

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CHAPTER 29—COMMISSIONS, OATHS, RECORDS, AND REPORTS

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SUBCHAPTER II—REPORTS

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§ 2952. Time of making annual reports

Except when a different time is specifically prescribed by statute, the head of each Executive department or military department shall make the annual reports, required to be submitted to Congress, at the beginning of each regular session of Congress. The reports shall cover the transactions of the preceding year.
(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 413.)

§ 2953. Reports to Congress on additional employee requirements

(a) Each report, recommendation, or other communication, of an official nature, of an Executive agency which—

(1) relates to pending or proposed legislation which, if enacted, will entail an estimated annual expenditure of appropriated funds in excess of $1,000,000;

(2) is submitted or transmitted to Congress or a committee thereof in compliance with law or on the initiative of the appropriate authority of the executive branch; and

(3) officially proposes or recommends the creation or expansion, either by action of Congress or by administrative action, of a function, activity, or authority of the Executive agency to be in addition to those functions, activities, and authorities thereof existing when the report, recommendation, or other communication is so submitted or transmitted;

shall contain a statement, concerning the Executive agency, for each of the first 5 fiscal years during which each additional or expanded function, activity, or authority so proposed or recommended is to be in effect, setting forth the following information—

(A) the estimated maximum additional—

(i) man-years of civilian employment, by general categories of positions;

(ii) expenditures for personal services; and

(iii) expenditures for all purposes other than personal services;

which are attributable to the function, activity, or authority and which will be required to be effected by the Executive agency in connection with the performance thereof; and

(B) such other statement, discussion, explanation, or other information as is considered advisable by the appropriate authority of the executive branch or that is required by Congress or a committee thereof.

(b) Subsection (a) of this section does not apply to—

(1) the Central Intelligence Agency;

(2) a Government controlled corporation; or

(3) the General Accounting Office.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 413.)

§ 2954. Information to committees of Congress on request

An Executive agency, on request of the Committee on Government Operations of the House of Representatives, or of any seven members thereof, or on request of the Committee on Government Operations of the Senate, or any five members thereof, shall submit any information requested of it relating to any matter within the jurisdiction of the committee.
(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 413.)

TITLE 5, U.S. CODE—APPENDIX

FEDERAL ADVISORY COMMITTEE ACT

Pub. L. 92-463, Oct. 6, 1972, 86 Stat. 770, as amended by Pub. L. 94-409, § 5(c), Sept. 13, 1976, 90 Stat. 1247; Pub. L. 96-523, § 2, Dec. 12, 1980, 94 Stat. 3040; Pub. L. 97-375, title II, § 201(c), Dec. 21, 1982, 96 Stat. 1822; 1977 Reorg. Plan No. 1, § 5F, eff. Nov. 20, 1977, 42 F.R. 56101, 91 Stat. 1634; 1978 Reorg. Plan No. 2, § 102, eff. Jan. 1, 1979, 43 F.R. 36067, 92 Stat. 3783.

§ 1. Short title

This Act may be cited as the "Federal Advisory Committee Act".

§ 2. Findings and purpose

(a) The Congress finds that there are numerous committees, boards, commissions, councils, and similar groups which have been established to advise officers and agencies in the executive branch of the Federal Government and that they are frequently a useful and beneficial means of furnishing expert advice, ideas, and diverse opinions to the Federal Government.

(b) The Congress further finds and declares that—

(1) the need for many existing advisory committees has not been adequately reviewed;

(2) new advisory committees should be established only when they are determined to be essential and their number should be kept to the minimum necessary;

(3) advisory committees should be terminated when they are no longer carrying out the purposes for which they were established;

(4) standards and uniform procedures should govern the establishment, operation, administration, and duration of advisory committees;

(5) the Congress and the public should be kept informed with respect to the number, purpose, membership, activities, and cost of advisory committees; and

(6) the function of advisory committees should be advisory only, and that all matters under their consideration should be determined, in accordance with law, by the official, agency, or officer involved.

§ 3. Definitions

For the purpose of this Act—.

(1) The term "Administrator" means the Administrator of General Services.

(2) The term "advisory committee" means any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof (hereafter in this paragraph referred to as "committee"), which is—

(A) established by statute or reorganization plan, or

(B) established or utilized by the President, or

(C) established or utilized by one or more agencies,

in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government, except that such term excludes (i) the Advisory Commission on Intergovernmental Relations, (ii) the Commission on Government Procurement, and (iii) any committee which is composed wholly of full-time officers or employees of the Federal Government.

(3) The term "agency" has the same meaning as in section 551(1) of title 5, United States Code.

(4) The term "Presidential advisory committee" means an advisory committee which advises the President.

§ 4. Applicability; restrictions

(a) The provisions of this Act or of any rule, order, or regulation promulgated under this Act shall apply to each advisory committee except to the extent that any Act of Congress establishing any such advisory committee specifically provides otherwise.

(b) Nothing in this Act shall be construed to apply to any advisory committee established or utilized by—

(1) the Central Intelligence Agency; or

(2) the Federal Reserve System.

(c) Nothing in this Act shall be construed to apply to any local civic group whose primary function is that of rendering a public service with respect to a Federal program, or any State or local committee, council, board, commission, or similar group established to advise or make recommendations to State or local officials or agencies.

§ 5. Responsibilities of Congressional committees; review; guidelines

(a) In the exercise of its legislative review function, each standing committee of the Senate and the House of Representatives shall make a continuing review of the activities of each advisory committee under its jurisdiction to determine whether such advisory committee should be abolished or merged with any other advisory committee, whether the responsibilities of such advisory committee should be revised, and whether such advisory committee performs a necessary function not already being performed. Each such standing committee shall take appropriate action to obtain the enactment of legislation necessary to carry out the purpose of this subsection.

(b) In considering legislation establishing, or authorizing the establishment of any advisory committee, each standing committee of the Senate and of the House of Representatives shall determine, and report such determination to the Senate or to the House of Representatives, as the case may be, whether the functions of the proposed advisory committee are being or could be performed by one or more agencies or by an advisory committee already in existence, or by enlarging the mandate of an existing advisory committee. Any such legislation shall—

(1) contain a clearly defined purpose for the advisory committee;

(2) require the membership of the advisory committee to be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee;

(3) contain appropriate provisions to assure that the advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority or by any special interest, but will instead be the result of the advisory committee's independent judgment;

(4) contain provisions dealing with authorization of appropriations, the date for submission of reports (if any), the duration of the advisory committee, and the publication of reports and other materials, to the extent that the standing committee determines the provisions of section 10 of this Act to be inadequate; and

(5) contain provisions which will assure that the advisory committee will have adequate staff (either supplied by an agency or employed by it), will be provided adequate quarters, and will have funds available to meet its other necessary expenses.

(c) To the extent they are applicable, the guidelines set out in subsection (b) of this section shall be followed by the President, agency heads, or other Federal officials in creating an advisory committee.

§ 6. Responsibilities of the President; report to Congress; annual report to Congress; exclusion

(a) The President may delegate responsibility for evaluating and taking action, where appropriate, with respect to all public recommendations made to him by Presidential advisory committees.

(b) Within one year after a Presidential advisory committee has submitted a public report to the President, the President or his delegate shall make a report to the Congress stating either his proposals for action or his reasons for inaction, with respect to the recommendations contained in the public report.

(c) The President shall, not later than December 31 of each year, make an annual report to the Congress on the activities, status, and changes in the composition of advisory committees in existence during the preceding fiscal year. The report shall contain the name of every advisory committee, the date of and authority for its creation, its termination date or the date it is to make a report, its functions, a reference to the reports it has submitted, a statement of whether it is an ad hoc or continuing body, the dates of its meetings, the names and occupations of its current members, and the total estimated annual cost to the United States to fund, service, supply, and maintain such committee. Such report shall include a list of those advisory committees abolished by the President, and in the case of advisory committees established by statute, a list of those advisory committees which the President recommends be abolished together with his reasons therefor. The President shall exclude from this report any information which, in his judgment, should be withheld for reasons of national security, and he shall include in such report a statement that such information is excluded.

§ 7. Responsibilities of the Administrator of General Services; Committee Management Secretariat, establishment; review; recommendations to President and Congress; agency cooperation; performance guidelines; uniform pay guidelines; travel expenses; expense recommendations

(a) The Administrator shall establish and maintain within the General Services Administration a Committee Management Secretariat, which shall be responsible for all matters relating to advisory committees.

(b) The Administrator shall, immediately after October 6, 1972, institute a comprehensive review of the activities and responsibilities of each advisory committee to determine—

(1) whether such committee is carrying out its purpose;

(2) whether, consistent with the provisions of applicable statutes, the responsibilities assigned to it should be revised;

(3) whether it should be merged with other advisory committees; or

(4) whether it should be abolished.

The Administrator may from time to time request such information as he deems necessary to carry out his functions under this subsection. Upon the completion of the Administrator's review he shall make recommendations to the President and to either the agency head or the Congress with respect to action he believes should be taken. Thereafter, the Administrator shall carry out a similar review annually. Agency heads shall cooperate with the Administrator in making the reviews required by this subsection.

(c) The Administrator shall prescribe administrative guidelines and management controls applicable to advisory committees, and, to the maximum extent feasible, provide advice, assistance, and guidance to advisory committees to improve their performance. In carrying out his functions under this subsection, the Administrator shall consider the recommendations of each agency head with respect to means of improving the performance of advisory committees whose duties are related to such agency.

(d)(1) The Administrator, after study and consultation with the Director of the Office of Personnel Management, shall establish guidelines with respect to uniform fair rates of pay for comparable services of members, staffs, and consultants of advisory committees in a manner which gives appropriate recognition to the responsibilities and qualifications required and other relevant factors. Such regulations shall provide that—

(A) no member of any advisory committee or of the staff of any advisory committee shall receive compensation at a rate in excess of the rate specified for GS–18 of the General Schedule under section 5332 of title 5, United States Code;

(B) such members, while engaged in the performance of their duties away from their homes or regular places of business, may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of title 5, United States Code, for persons employed intermittently in the Government service; and

(C) such members—

(i) who are blind or deaf or who otherwise qualify as handicapped individuals (within the meaning of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 794)), and

(ii) who do not otherwise qualify for assistance under section 3102 of title 5, United States Code, by reason of being an employee of an agency (within the meaning of section 3102(a)(1) of such title 5),

may be provided services pursuant to section 3102 of such title 5 while in performance of their advisory committee duties.

(2) Nothing in this subsection shall prevent—

(A) an individual who (without regard to his service with an advisory committee) is a fulltime employee of the United States, or

(B) an individual who immediately before his service with an advisory committee was such an employee,

from receiving compensation at the rate at which he otherwise would be compensated (or was compensated) as a full-time employee of the United States.

(e) The Administrator shall include in budget recommendations a summary of the amounts he deems necessary for the expenses of advisory committees, including the expenses for publication of reports where appropriate.

§ 8. Responsibilities of agency heads; Advisory Committee Management Officer, designation

(a) Each agency head shall establish uniform administrative guidelines and management controls for advisory committees established by that agency, which shall be consistent with directives of the Administrator under section 7 and section 10. Each agency shall maintain systematic information on the nature, functions, and operations of each advisory committee within its jurisdiction.

(b) The head of each agency which has an advisory committee shall designate an Advisory Committee Management Officer who shall—

(1) exercise control and supervision over the establishment, procedures, and accomplishments of advisory committees established by that agency;

(2) assemble and maintain the reports, records, and other papers of any such committee during its existence; and

(3) carry out, on behalf of that agency, the provisions of section 552 of title 5, United States Code, with respect to such reports, records, and other papers.

§ 9. Establishment and purpose of advisory committees; publication in Federal Register; charter: filing, contents, copy

(a) No advisory committee shall be established unless such establishment is—

(1) specifically authorized by statute or by the President; or

(2) determined as a matter of formal record, by the head of the agency involved after consultation with the Administrator, with timely notice published in the Federal Register, to be in the public interest in connection with the performance of duties imposed on that agency by law.

(b) Unless otherwise specifically provided by statute or Presidential directive, advisory committees shall be utilized solely for advisory functions. Determinations of action to be taken and policy to be expressed with respect to matters upon which an advisory committee reports or makes recommendations shall be made solely by the President or an officer of the Federal Government.

(c) No advisory committee shall meet or take any action until an advisory committee charter has been filed with (1) the Administrator, in the case of Presidential advisory committees, or (2) with the head of the agency to whom any advisory committee reports and with the standing committees of the Senate and of the House of Representatives having legislative jurisdiction of such agency. Such charter shall contain the following information:

(A) the committee's official designation;

(B) the committee's objectives and the scope of its activity;

(C) the period of time necessary for the committee to carry out its purposes;

(D) the agency or official to whom the committee reports;

(E) the agency responsible for providing the necessary support for the committee;

(F) a description of the duties for which the committee is responsible, and, if such duties are not solely advisory, a specification of the authority for such functions;

(G) the estimated annual operating costs in dollars and man-years for such committee;

(H) the estimated number and frequency of committee meetings;

(I) the committee's termination date, if less than two years from the date of the committee's establishment; and

(J) the date the charter is filed.

A copy of any such charter shall also be furnished to the Library of Congress.

§ 10. Advisory committee procedures; meetings; notice, publication in Federal Register; regulations; minutes; certification; annual report; Federal officer or employee, attendance

(a)(1) Each advisory committee meeting shall be open to the public.

(2) Except when the President determines otherwise for reasons of national security, timely notice of each such meeting shall be published in the Federal Register, and the Administrator shall prescribe regulations to provide for other types of public notice to insure that all interested persons are notified of such meeting prior thereto.

(3) Interested persons shall be permitted to attend, appear before, or file statements with any advisory committee, subject to such reasonable rules or regulations as the Administrator may prescribe.

(b) Subject to section 552 of title 5, United States Code, the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection and copying at a single location in the offices of the advisory committee or the agency to which the advisory committee reports until the advisory committee ceases to exist.

(c) Detailed minutes of each meeting of each advisory committee shall be kept and shall contain a record of the persons present, a complete and accurate description of matters discussed and conclusions reached, and copies of all reports received, issued, or approved by the advisory committee. The accuracy of all minutes shall be certified to by the chairman of the advisory committee.

(d) Subsections (a)(1) and (a)(3) of this section shall not apply to any portion of an advisory committee meeting where the President, or the head of the agency to which the advisory committee reports, determines that such portion of such meeting may be closed to the public in accordance with subsection (c) of section 552b of title 5, United States Code. Any such determination shall be in writing and shall contain the reasons for such determination. If such a determination is made, the advisory committee shall issue a report at least annually setting forth a summary of its activities and such related matters as would be informative to the public consistent with the policy of section 552(b) of title 5, United States Code.

(e) There shall be designated an officer or employee of the Federal Government to chair or attend each meeting of each advisory committee. The officer or employee so designated is authorized, whenever he determines it to be in the public interest, to adjourn any such meeting. No advisory committee shall conduct any meeting in the absence of that officer or employee.

(f) Advisory committees shall not hold any meetings except at the call of, or with the advance approval of, a designated officer or employee of the Federal Government, and in the case of advisory committees (other than Presidential advisory committees), with an agenda approved by such officer or employee.

§ 11. Availability of transcripts; "agency proceeding"

(a) Except where prohibited by contractual agreements entered into prior to the effective date of this Act, agencies and advisory committees shall make available to any person, at actual cost of duplication, copies of transcripts of agency proceedings or advisory committee meetings.

(b) As used in this section "agency proceeding" means any proceeding as defined in section 551(12) of title 5, United States Code.

§ 12. Fiscal and administrative provisions; recordkeeping; audit; agency support services

(a) Each agency shall keep records as will fully disclose the disposition of any funds which may be at the disposal of its advisory committees and the nature and extent of their activities. The General Services Administration, or such other agency as the President may designate, shall maintain financial records with respect to Presidential advisory committees. The Comptroller

General of the United States, or any of his authorized representatives, shall have access, for the purpose of audit and examination, to any such records.

(b) Each agency shall be responsible for providing support services for each advisory committee established by or reporting to it unless the establishing authority provides otherwise. Where any such advisory committee reports to more than one agency, only one agency shall be responsible for support services at any one time. In the case of Presidential advisory committees, such services may be provided by the General Services Administration.

§ 13. Responsibilities of Library of Congress; reports and background papers; depository

Subject to section 552 of title 5, United States Code, the Administrator shall provide for the filing with the Library of Congress of at least eight copies of each report made by every advisory committee and, where appropriate, background papers prepared by consultants. The Librarian of Congress shall establish a depository for such reports and papers where they shall be available to public inspection and use.

§ 14. Termination of advisory committees; renewal; continuation

(a)(1) Each advisory committee which is in existence on the effective date of this Act shall terminate not later than the expiration of the two-year period following such effective date unless—

(A) in the case of an advisory committee established by the President or an officer of the Federal Government, such advisory committee is renewed by the President or that officer by appropriate action prior to the expiration of such two-year period; or

(B) in the case of an advisory committee established by an Act of Congress, its duration is otherwise provided for by law.

(2) Each advisory committee established after such effective date shall terminate not later than the expiration of the two-year period beginning on the date of its establishment unless—

(A) in the case of an advisory committee established by the President or an officer of the Federal Government, such advisory committee is renewed by the President or such officer by appropriate action prior to the end of such period; or

(B) in the case of an advisory committee established by an Act of Congress, its duration is otherwise provided for by law.

(b)(1) Upon the renewal of any advisory committee, such advisory committee shall file a charter in accordance with section 9(c).

(2) Any advisory committee established by an Act of Congress shall file a charter in accordance with such section upon the expiration of each successive two-year period following the date of enactment of the Act establishing such advisory committee.

(3) No advisory committee required under this subsection to file a charter shall take any action (other than preparation and filing of such charter) prior to the date on which such charter is filed.

(c) Any advisory committee which is renewed by the President or any officer of the Federal Government may be continued only for successive two-year periods by appropriate action taken by the President or such officer prior to the date on which such advisory committee would otherwise terminate.

TITLE 18, U.S. CODE—CRIMES AND CRIMINAL PROCEDURES

This title was enacted by act June 25, 1948, ch. 645, 62 Stat. 683

PART 1—CRIMES

* * * * *

CHAPTER 23—CONTRACTS

* * * * *

§ 435. Contracts in excess of specific appropriation

Whoever, being an officer or employee of the United States, knowingly contracts for the erection, repair, or furnishing of any public building, or for any public improvement, to pay a larger amount than the specific sum appropriated for such purpose, shall be fined not more than $1,000 or imprisoned not more than one year, or both.
(June 25, 1948, ch. 645, 62 Stat. 703.)

* * * * *

CHAPTER 31—EMBEZZLEMENT AND THEFT

§ 641. Public money, property or records

Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The word "value" means face, par, or market value, or cost price, either wholesale or retail, which ever is greater.
(June 25, 1948, ch. 645, 62 Stat. 725.)

* * * * *

§ 643. Accounting generally for public money

Whoever, being an officer, employee or agent of the United States or of any department or agency thereof, having received public money which he is not authorized to retain as salary, pay, or emolument, fails to render his accounts for the same as provided by law is guilty of embezzlement, and shall be fined in a sum equal to the amount of the money embezzled or imprisoned not more than ten years, or both; but if the amount embezzled does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(June 25, 1948, ch. 645, 62 Stat. 726.)

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CHAPTER 93—PUBLIC OFFICERS AND EMPLOYEES

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§ 1905. Disclosure of confidential information generally

Whoever, being an officer or employee of the United States or of any department or agency thereof, or agent of the Department of Justice as defined in the Antitrust Civil Process Act (15 U.S.C. 1311-1314), publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment.

(June 25, 1948, ch. 645, 62 Stat. 791; Sept. 12, 1980, Pub. L. 96–349 § 7(b), 94 Stat. 1158.)

TITLE 28, U.S. CODE—JUDICIARY AND JUDICIAL PROCEDURE

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PART IV—JURISDICTION AND VENUE

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CHAPTER 85—DISTRICT COURTS; JURISDICTION

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§ 1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or uliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United

States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 6226, 6228(a), 7426, or 7428 (in the case of the United States district court for the District of Columbia) or section 7429 of the Internal Revenue Code of 1954.

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

(June 25, 1948, ch. 646, 62 Stat. 933; Apr. 25, 1949, ch. 92, § 2(a), 63 Stat. 62; May 24, 1949, ch. 139, § 80(a), (b), 63 Stat. 101; Oct. 31, 1951, ch. 655, § 50(b), 65 Stat. 727; July 30, 1954, ch. 648, § 1, 68 Stat. 589; July 7, 1958, Pub. L. 85–508, § 12(e), 72 Stat. 348; Aug. 30, 1964, Pub. L. 88–519, 78 Stat. 699; Nov. 2, 1966, Pub. L. 89–719, title II, § 202(a), 80 Stat. 1148; July 23, 1970, Pub. L. 91–350, § 1(a), 84 Stat. 449; Oct. 25, 1972, Pub. L. 92–562, § 1, 86 Stat. 1176; Oct. 4, 1976, Pub. L. 94–455, title XII, § 1204(c)(1), title XIII, § 1306(b)(7), 90 Stat. 1697, 1719; Nov. 1, 1978, Pub. L. 95–563, § 14(a), 92 Stat. 2389; Apr. 2, 1982, Pub. L. 97–164, title I, § 129, 96 Stat. 39; Sept. 3, 1982, Pub. L. 97–248, title IV, § 402(c)(17), 96 Stat. 669.)

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CHAPTER 91—UNITED STATES CLAIMS COURT

§ 1491. Claims against United States generally; actions involving Tennessee Valley Authority

(a)(1) The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable rec-

ords, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. the Claims Court shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 10(a)(1) of the Contract Disputes Act of 1978.

(3) To afford complete relief on any contract claim brought before the contract is awarded, the court shall have exclusive jurisdiction to grant declaratory judgments and such equitable and extraordinary relief as it deems proper, including but not limited to injunctive relief. In exercising this jurisdiction, the court shall give due regard to the interests of national defense and national security.

(b) Nothing herein shall be construed to give the United States Claims Court jurisdiction of any civil action within the exclusive jurisdiction of the Court of International Trade, or of any action against, or founded on conduct of, the Tennessee Valley Authority, or to amend or modify the provisions of the Tennessee Valley Authority Act of 1933 with respect to actions by or against the Authority.

(June 25, 1948, ch. 646, 62 Stat. 940; July 28, 1953, ch. 253, § 7, 67 Stat. 226; Sept. 3, 1954, ch. 1263, § 44(a), (b), 68 Stat. 1241; July 23, 1970, Pub. L. 91-350, § 1(b), 84 Stat. 449; Aug. 29, 1972, Pub. L. 92-415, § 1, 86 Stat. 652; Nov. 1, 1978, Pub. L. 95-563, § 14(i), 92 Stat. 2391; Oct. 10, 1980, Pub. L. 96-417, title V, § 509, 94 Stat. 1743; Apr. 2, 1982, Pub. L. 97-164, title I, § 133(a), 96 Stat. 39.)

EXPLANATORY NOTE

Derivation; Popular Name. Sections 1346 and 1491 of title 28 can be traced back to the Act of March 3, 1887, 24 Stat. 505, which is popularly known as the Tucker Act.

Claims Court. Public law 97-164, April 2, 1982, 96 Stat. 27, created the United States Claims Court, abolished the Court of Claims, and created the Federal Circuit, headed by a United States Court of Appeals.

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PART V—PROCEDURE

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CHAPTER 125—PENDING ACTIONS AND JUDGMENTS

§ 1961. Interest

(a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. The Director of the Administrative Office of the United States Courts shall distribute notice of that rate and any changes in it to all Federal judges.

(b) Interest shall be computed daily to the date of payment except as provided in section 2516(b) of this title and section 1304(b) of title 31, and shall be compounded annually.

(c)(1) This section shall not apply in any judgment of any court with respect to any internal revenue tax case. Interest shall be allowed in such cases at a rate established under section 6621 of the Internal Revenue Code of 1954.

(2) Except as otherwise provided in paragraph (1) of this subsection, interest shall be allowed on all final judgments against the United States in the United States Court of Appeals for the Federal Circuit, at the rate provided in subsection (a) and as provided in subsection (b).

(3) Interest shall be allowed, computed, and paid on judgments of the United States Claims Court only as provided in paragraph (1) of this subsection or in any other provision of law.

(4) This section shall not be construed to affect the interest on any judgment of any court not specified in this section.

(June 25, 1948, ch. 646, 62 Stat. 957; Apr. 2, 1982, Pub. L. 97-164, title III, § 302(a), 96 Stat. 55; Sept. 13, 1982, Pub. L. 97-258, § 2(m)(1), 96 Stat. 1062; Jan. 12, 1983, Pub. L. 97-452, § 2(d)(1), 96 Stat. 2478.)

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PART VI—PARTICULAR PROCEEDINGS

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CHAPTER 161—UNITED STATES AS PARTY GENERALLY

§ 2401. Time for commencing action against United States

(a) Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

(June 25, 1948, ch. 646, 62 Stat. 971; Apr. 25, 1949, ch. 92, § 1, 63 Stat. 62; Sept. 8, 1959, Pub. L. 86-238, § 1(3), 73 Stat. 472; July 18, 1966, Pub.

L. 89-506, § 7, 80 Stat. 307; Nov. 1, 1978, Pub. L. 95-563, § 14(b), 92 Stat. 2389.)

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§ 2412. Costs and fees

(a) Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. A judgment for costs when taxed against the United States shall, in an amount established by statute, court rule, or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation.

(b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

(c)(1) Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for costs pursuant to subsection (a) shall be paid as provided in sections 2414 and 2517 of this title and shall be in addition to any relief provided in the judgment.

(2) Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for fees and expenses of attorneys pursuant to subsection (b) shall be paid as provided in sections 2414 and 2517 of this title, except that if the basis for the award is a finding that the United States acted in bad faith, then the award shall be paid by any agency found to have acted in bad faith and shall be in addition to any relief provided in the judgment.

(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

(C) The court, in its discretion, may reduce the amount to be awarded pursuant to this subsection, or deny an award, to the extent that the prevailing party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy.

(2) For the purposes of this subsection—

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.);

(B) "party" means (i) an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association;

(C) "United States" includes any agency and any official of the United States acting in his or her official capacity;

(D) "position of the United States" means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based; except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings;

(E) "civil action brought by or against the United States" includes an appeal by a party, other than the United States, from a decision of a contracting officer rendered pursuant to a disputes clause in a contract with the Government or pursuant to the Contract Disputes Act of 1978;

(F) "court" includes the United States Claims Court;

(G) "final judgment" means a judgment that is final and not appealable, and includes an order of settlement; and

(H) "prevailing party", in the case of eminent domain proceedings, means a party who obtains a final judgment (other than by settlement), exclusive of interest, the amount of which is at least as close to the highest valuation of the property involved that is attested to at trial on behalf of the property owner as it is to the highest valuation of the property involved that is attested to at trial on behalf of the Government.

(3) In awarding fees and other expenses under this subsection to a prevailing party in any action for judicial review of an adversary adjudication, as defined in subsection (b)(1)(C) of section 504 of title 5, United States Code, or an adversary adjudication subject to the Contract Disputes Act of 1978, the court shall include in that award fees and other expenses to the same extent authorized in subsection (a) of such section, unless the court finds that during such adversary adjudication the position of the United Staets was substantially justified, or that special circumstances make an award unjust.

(4) Fees and other expenses awarded under this subsection to a party shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise.

(5) The Director of the Administrative Office of the United States Courts shall include in the annual report prepared pursuant to section 604 of this title, the amount of fees and other expenses awarded during the preceding fiscal year pursuant to this subsection. The report shall describe the number, nature, and amount of the awards, the claims involved in the controversy, and any other relevant information which may aid the Congress in evaluating the scope and impact of such awards.

* * * * *

(f) If the United States appeals an award of costs or fees and other expenses made against the United States under this section and the award is affirmed in whole or in part, interest shall be paid on the amount of the award as affirmed. Such interest shall be computed at the rate determined under section 1961(a) of this title, and shall run from the date of the award through the day before the date of the mandate of affirmance.

(June 25, 1948, ch. 646, 62 Stat. 973; July 18, 1966, Pub. L. 89–507, § 1, 80 Stat. 308; Oct. 21, 1980, Pub. L. 96–481, title II, § 204(a), (c), 94 Stat. 2327, 2329; Sept. 3, 1982, Pub. L. 97–248, title II, § 292(c), 96 Stat. 574; Aug. 5, 1985, Pub. L. 99–80, §§ 2, 6, 99 Stat. 184, 186.)

* * * * *

§ 2414. Payment of judgments and compromise settlements

Except as provided by the Contract Disputes Act of 1978, payment of final judgments rendered by a district court or the Court of International Trade against the United States shall be made on settlements by the General Accounting Office. Payment of final judgments rendered by a State or foreign court or tribunal against the United States, or against its agencies or officials upon obligations or liabilities of the United States, shall be made on settlements by the General Accounting Office after certification by the Attorney General that it is in the interest of the United States to pay the same.

Whenever the Attorney General determines that no appeal shall be taken from a judgment or that no further review will be sought from a decision affirming the same, he shall so certify and the judgment shall be deemed final.

Except as otherwise provided by law, compromise settlements of claims referred to the Attorney General for defense of imminent litigation or suits against the United States, or against its agencies or officials upon obligations or liabilities of the United States, made by the Attorney General or any person authorized by him, shall be settled and paid in a manner similar to judgments in like causes and appropriations or funds available for the payment of such judgments are hereby made available for the payment of such compromise settlements.

(June 25, 1948, ch. 646, 62 Stat. 974; Aug. 30, 1961, Pub. L. 87–187, § 1, 75 Stat. 415; Nov. 1, 1978, Pub. L. 95–563, § 14(d), 92 Stat. 2390; Oct. 10, 1980, Pub. L. 96–417, title V, § 512, 94 Stat. 1744.)

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CHAPTER 165—UNITED STATES CLAIMS COURT PROCEDURE

* * * * *

§ 2508. Counterclaim or set-off; registration of judgment

Upon the trial of any suit in the United States Claims Court in which any setoff, counterclaim, claim for damages, or other demand is set up on the part of the United States against any plaintiff making claim against the United States in said court, the court shall hear and determine such claim or demand both for and against the United States and plaintiff.

If upon the whole case it finds that the plaintiff is indebted to the United States it shall render judgment to that effect, and such judgment shall be final and reviewable.

The transcript of such judgment, filed in the clerk's office of any district court, shall be entered upon the records and shall be enforceable as other judgments.

(June 25, 1948, ch. 646, 62 Stat. 977; July 28, 1953, ch. 253, § 10, 67

Stat. 227; Sept. 3, 1954, ch. 1263, § 47(a), 68 Stat. 1243; Apr. 2, 1982, Pub. L. 97–164, title I, § 139(g), 96 Stat. 42.)

* * * * *

§ 2516. Interest on claims and judgments

(a) Interest on a claim against the United States shall be allowed in a judgment of the United States Claims Court only under a contract or Act of Congress expressly providing for payment thereof.

(b) Interest on a judgment against the United States affirmed by the Supreme Court after review on petition of the United States is paid at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately before the date of judgment.

(June 25, 1948, ch 646, 62 Stat. 978; Sept. 3, 1954, ch. 1263, § 57, 68 Stat. 1248; Apr. 2, 1982, Pub. L. 97–164, title I, § 139(j)(2), title III, § 302(d), 96 Stat. 43, 56; Sept. 13, 1982, Pub. L. 97–258, § 2(g)(5), (m)(3), 96 Stat. 1061, 1062.)

* * * * *

§ 2517. Payment of judgments

(a) Except as provide by the Contract Disputes Act of 1978, every final judgment rendered by the United States Claims Court against the United States shall be paid out of any general appropriation therefor, on presentation to the General Accounting Office of a certification of the judgment by the clerk and chief judge of the court.

(b) Payment of any such judgment and of interest thereon shall be a full discharge to the United States of all claims and demands arising out of the matters involved in the case or controversy, unless the judgment is designated a partial judgment, in which event only the matters described therein shall be discharged.

(June 25, 1948, ch. 646, 62 Stat. 979; Nov. 1, 1978, Pub. L. 95–563, § 14(e), (f), 92 Stat. 2390; Apr. 2, 1982, Pub. L. 97–164, title I, § 139(k), 96 Stat. 43.)

TITLE 31, U.S. CODE—MONEY AND FINANCE

Editor's Note: Title 31 was recodified, with substantial rearrangement of sections and transfer of sections from and to other titles of the U.S. Code, and enacted into law by Public Law 97–258, § 1, September 13, 1982, 96 Stat. 877.

SUBTITLE I–GENERAL

CHAPTER I—DEFINITIONS

§ 101. Agency

In this title, "agency" means a department, agency, or instrumentality of the United States Government.
(Pub. L. 97–258, Sept. 13, 1982, 96 Stat. 877.)

§ 102. Executive agency

In this title, "executive agency" means a department, agency, or instrumentality in the executive branch of the United States.
(Pub. L. 97–258, Sept. 13, 1982, 96 Stat. 877.)

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SUBTITLE II—THE BUDGET PROCESS

CHAPTER 11—THE BUDGET AND FISCAL, BUDGET, AND PROGRAM INFORMATION

§ 1101. Definitions

In this chapter—

(1) "agency" includes the District of Columbia government but does not include the legislative branch or the Supreme Court.

(2) "appropriations" means appropriated amounts and includes, in appropriate context—

(A) funds;

(B) authority to make obligations by contract before appropriations; and

(C) other authority making amounts available for obligation or expenditure.

(Pub. L. 97–258, Sept. 13, 1982, 96 Stat. 907.)

* * * * *

§ 1105. Budget contents and submission to Congress

(a) On or before the first Monday after January 3 of each year (or on or before February 5 in 1986), the President shall submit a budget of the

United States Government for the following fiscal year. Each budget shall include a budget message and summary and supporting information. The President shall include in each budget the following:

* * * * *

(e)(1) **[Capital investment programs]** The President shall submit with materials related to each budget transmitted under subsection (a) on or after January 1, 1985, an analysis for the ensuing fiscal year that shall identify requested appropriations or new obligational authority and outlays for each major program that may be classified as a public civilian capital investment program and for each major program that may be classified as a military capital investment program, and shall contain summaries of the total amount of such appropriations or new obligational authority and outlays for public civilian capital investment programs and summaries of the total amount of such appropriations or new obligational authority and outlays for military capital investment programs. In addition, the analysis under this paragraph shall contain—

(A) an estimate of the current service levels of public civilian capital investment and of military capital investment and alternative high and low levels of such investments over a period of ten years in current dollars and over a period of five years in constant dollars;

(B) the most recent assessment analysis and summary, in a standard format, of public civilian capital investment needs in each major program area over a period of ten years;

(C) an identification and analysis of the principal policy issues that affect estimated public civilian capital investment needs for each major program; and

(D) an identification and analysis of factors that affect estimated public civilian capital investment needs for each major program, including but not limited to the following factors:

(i) economic assumptions;

(ii) engineering standards;

(iii) estimates of spending for operation and maintenance;

(iv) estimates of expenditures for similar investments by State and local governments; and

(v) estimates of demand for public services derived from such capital investments and estimates of the service capacity of such investments.

To the extent that any analysis required by this paragraph relates to any program for which Federal financial assistance is distributed under a formula prescribed by law, such analysis shall be organized by State and within each State by major metropolitan area if data are available.

(2) For purposes of this subsection, any appropriation, new obligational authority, or outlay shall be classified as a public civilian capital investment to the extent that such appropriation, authority, or outlay will be used for the construction, acquisition, or rehabilitation of any physical asset that is capable of being used to produce services or other benefits for a number

of years and is not classified as a military capital investment under paragraph (3). Such assets shall include (but not be limited to)—

(A) roadways or bridges,
(B) airports or airway facilities,
(C) mass transportation systems,
(D) wastewater treatment or related facilities,
(E) water resources projects,
(F) hospitals,
(G) resource recovery facilities,
(H) public buildings,
(I) space or communications facilities,
(J) railroads, and
(K) federally assisted housing.

(3) for purposes of this subsection, any appropriation, new obligational authority, or outlay shall be classified as a military capital investment to the extent that such appropriation, authority, or outlay will be used for the construction, acquisition, or rehabilitation of any physical asset that is capable of being used to produce services or other benefits for purposes of national defense and security for a number of years. Such assets shall include military bases, posts, installations, and facilities.

(4) Criteria and guidelines for use in the identification of public civilian and military capital investments, for distinguishing between public civilian and military capital investments, and for distinguishing between major and nonmajor capital investment programs shall be issued by the Director of the Office of Management and Budget after consultation with the Comptroller General and the Congressional Budget Office. The analysis submitted under this subsection shall be accompanied by an explanation of such criteria and guidelines.

(5) For purposes of this subsection—

(A) the term "construction" includes the design, planning, and erection of new structures and facilities, the expansion of existing structures and facilities, the reconstruction of a project at an existing site or adjacent to an existing site, and the installation of initial and replacement equipment for such structures and facilities;

(B) the term "acquisition" includes the addition of land, sites, equipment, structures, facilities, or rolling stock by purchase, lease-purchase, trade, or donation; and

(C) the term "rehabilitation" includes the alteration of or correction of deficiencies in an existing structure or facility so as to extend the useful life or improve the effectiveness of the structure or facility, the modernization or replacement of equipment at an existing structure or facility, and the modernization of, or replacement of parts for, rolling stock.

* * * * *

(Pub. L. 97–258, Sept. 13, 1982, 96 Stat. 908; Pub. L. 97–452, § 1(2), Jan. 12, 1983, 96 Stat. 2467; Pub. L. 98–501, title II, § 203, Oct. 19, 1984, 98 Stat. 2324; Pub. L. 99–177, title II, § 241, Dec. 12, 1985, 99 Stat. 1063.)

EXPLANATORY NOTE

Capital Investment Information. Subsection (e) was added by section 203 of the Act of October 19, 1984, Public Law 98–501, 98 Stat. 2324. Section 201 of the 1984 Act provided that title II of the Act may be cited as the "Federal Capital Investment Program Information Act."

* * * * *

§ 1108. Preparation and submission of appropriations requests to the President

(a) In this section (except subsections (b)(1) and (e)), "agency" means a department, agency, or instrumentality of the United States Government.

(b)(1) The head of each agency shall prepare and submit to the President each appropriation request for the agency. The request shall be prepared and submitted in the form prescribed by the President under this chapter and by the date established by the President. When the head of an agency does not submit a request by that date, the President shall prepare the request for the agency to be included in the budget or changes in the budget or as deficiency and supplemental appropriations. The President may change agency appropriation requests. Agency appropriation requests shall be developed from cost-based budgets in the way and at times prescribed by the President. The head of the agency shall use the cost-based budget to administer the agency and to divide appropriations or amounts.

(2) An officer or employee of an agency in the executive branch may submit to the President or Congress a request for legislation authorizing deficiency or supplemental appropriations for the agency only with the approval of the head of the agency.

(c) The head of an agency shall include with an appropriation request submitted to the President a report that the statement of obligations submitted with the request contains obligations consistent with section 1501 of this title. The head of the agency shall support the report with a certification of the consistency and shall support the certification with records showing that the amounts have been obligated. The head of the agency shall designate officials to make the certifications, and those officials may not delegate the duty to make the certifications. The certifications and records shall be kept in the agency—

(1) in a form that makes audits and reconciliations easy; and

(2) for a period necessary to carry out audits and reconciliations.

(d) To the extent practicable, the head of an agency shall—

(1) provide information supporting the agency's budget request for its missions by function and subfunction (including the mission of each organizational unit of the agency); and

(2) relate the agency's programs to its missions.

(e) Except as provided in subsection (f) of this section, an officer or employee of an agency (as defined in section 1101 of this title) may submit to Congress or a committee of Congress an appropriations estimate or request, a request for an increase in that estimate or request, or a recommendation on meeting the financial needs of the Government only when requested by either House of Congress.

(f) The Interstate Commerce Commission shall submit to Congress copies of budget estimates, requests, and information (including personnel needs), legislative recommendations, prepared testimony for congressional hearings, and comments on legislation at the same time they are sent to the President or the Office of Management and Budget. An officer of an agency may not impose conditions on or impair communication by the Commission with Congress, or a committee or member of Congress, about the information.

(g) Amounts available under law are available for field examinations of appropriation estimates. The use of the amounts is subject only to regulations prescribed by the appropriate standing committees of Congress.

(Pub. L. 97-258, Sept. 13, 1982, 96 Stat. 912.)

* * * * *

§ 1110. Year-ahead requests for authorizing legislation

A request to enact legislation authorizing new budget authority to continue a program or activity for a fiscal year shall be submitted to Congress before May 16 of the year before the year in which the fiscal year begins. If a new program or activity will continue for more than one year, the request must be submitted for at least the first and 2d fiscal years.

(Pub. L. 97-258, Sept. 13, 1982, 96 Stat. 913)

§ 1111. Improving economy and efficiency

To improve economy and efficiency in the United States Government, the President shall—

(1) make a study of each agency to decide, and may send Congress recommendations, on changes that should be made in—

(A) the organization, activities, and business methods of agencies;

(B) agency appropriations;

(C) the assignment of particular activities to particular services; and

(D) regrouping of services; and

(2) evaluate and develop improved plans for the organization, coordination, and management of the executive branch of the Government.

(Pub. L. 97-258, Sept. 13, 1982, 96 Stat. 913.)

§ 1112. Fiscal, budget, and program information

(a) In this section, "agency" means a department, agency, or instrumentality of the United States Government except a mixed-ownership Government corporation.

(b) In cooperation with the Comptroller General, the Secretary of the Treasury and the Director of the Office of Management and Budget shall establish and maintain standard data processing and information systems for fiscal, budget, and program information for use by agencies to meet the needs of the Government, and to the extent practicable, of State and local governments.

(c) The Comptroller General—

(1) in cooperation with the Secretary, the Director of the Office of Management and Budget, and the Director of the Congressional Budget Office, shall establish, maintain, and publish standard terms and classifications for fiscal, budget, and program information of the Government, including information on fiscal policy, receipts, expenditures, programs, projects, activities, and functions;

(2) when advisable, shall report to Congress on those terms and classifications, and recommend legislation necessary to promote the establishment, maintenance, and use of standard terms and classifications by the executive branch of the Government; and

(3) in carrying out this subsection, shall give particular consideration to the needs of the Committees on Appropriations and on the Budget of both Houses of Congress, the Committee on Ways and Means of the House, the Committee on Finance of the Senate, and the Congressional Budget Office.

(d) Agencies shall use the standard terms and classifications published under subsection (c)(1) of this section in providing fiscal, budget, and program information to Congress.

(e) In consultation with the President, the head of each executive agency shall take actions necessary to achieve to the extent possible—

(1) consistency in budget and accounting classifications;

(2) synchronization between those classifications and organizational structure; and

(3) information by organizational unit on performance and program costs to support budget justifications.

* * * * *

(Pub. L. 97-258, Sept. 13, 1982, 96 Stat. 913.)

§ 1113. Congressional Information

* * * * *

(b) When requested by a committee of Congress, by the Comptroller General, or by the Director of the Congressional Budget Office, the Secretary of the Treasury, the Director of the Office of Management and Budget, and the head of each executive agency shall—

(1) provide information on the location and kind of available fiscal, budget, and program information;

(2) to the extent practicable, prepare summary tables of that fiscal, budget, and program information and related information the committee, the Comptroller General, or the Director of the Congressional Budget Office considers necessary; and

(3) provide a program evaluation carried out or commissioned by an executive agency.

* * * * *

(Pub. L. 97–258, Sept. 13, 1982, 96 Stat. 914; Pub. L. 97–452, § 1(3), Jan. 12, 1983, 96 Stat. 2467.)

§ 1114. Budget information on consulting services

(a) The head of each agency shall include in the budget justification for the agency submitted each year to the Committees on Appropriations of both Houses of Congress—

(1) amounts requested for consulting services;

(2) the appropriation accounts from which the amounts are to be paid; and

(3) a description of the need for the consulting services, including a list of the major programs requiring those services.

(b) The Inspector General or comparable official of each agency shall submit to Congress each year, with the budget justification for the agency, an evaluation of the progress of the agency in establishing effective management controls and improving the accuracy and completeness of the information provided to the Federal Procurement Data System on contracts for consulting services. If the agency does not have an Inspector General or comparable official, the head of the agency or officer or employee designated by the head of the agency shall submit the evaluation.

(Pub. L. 97–258, Sept. 13, 1982, 96 Stat. 916.)

CHAPTER 13—APPROPRIATIONS

SUBCHAPTER I—GENERAL

§ 1301. Application

(a) Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.

(b) The reappropriation and diversion of the unexpended balance of an appropriation for a purpose other than that for which the appropriation originally was made shall be construed and accounted for as a new appropriation. The unexpended balance shall be reduced by the amount to be diverted.

(c) An appropriation in a regular, annual appropriation law may be construed to be permanent or available continuously only if the appropriation—

(1) is for rivers and harbors, lighthouses, public buildings, or the pay of the Navy and Marine Corps; or

(2) expressly provides that it is available after the fiscal year covered by the law in which it appears.

(d) A law may be construed to make an appropriation out of the Treasury or to authorize making a contract for the payment of money in excess of

an appropriation only if the law specifically states that an appropriation is made or that such a contract may be made.
(Pub. L. 97–258, Sept. 13, 1982, 96 Stat. 917.)

* * * * *

§ 1304. Judgments, awards, and compromise settlements.

(a) Necessary amounts are appropriated to pay final judgments, awards, compromise settlements, and interest and costs specified in the judgments or otherwise authorized by law when—

(1) payment is not otherwise provided for;

(2) payment is certified by the Comptroller General; and

(3) the judgment, award, or settlement is payable—

(A) under section 2414, 2517, 2672, or 2677 of title 28;

(B) under section 3723 of this title;

(C) under a decision of a board of contract appeals; or

(D) in excess of an amount payable from the appropriations of an agency for a meritorious claim under section 2733 or 2734 of title 10, section 715 of title 32, or section 203 of the National Aeronautics and Space Act of 1958 (42 U.S.C. 2473).

(b)(1) Interest may be paid from the appropriation made by this section—

(A) on a judgment of a district court, only when the judgment becomes final after review on appeal or petition by the United States Government, and then only from the date of filing of the transcript of the judgment with the Comptroller General through the day before the date of the mandate of affirmance; or

(B) on a judgment of the Court of Appeals for the Federal Circuit or the United States Claims Court under section 2516(b) of title 28, only from the date of filing of the transcript of the judgment with the Comptroller General through the day before the date of the mandate of affirmance.

(2) Interest payable under this subsection in a proceeding reviewed by the Supreme Court is not allowed after the end of the term in which the judgement is affirmed.

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(Pub. L. 97–258, §§ 1, 2(m)(2), Sept. 13, 1982, 96 Stat. 917, 1062.)

* * * * *

§ 1307. Public building construction

Amounts appropriated to construct public buildings remain available until completion of the work. When a building is completed and outstanding

liabilities for the construction are paid, balances remaining shall revert immediately to the Treasury.
(Pub. L. 97–258, Sept. 13, 1982, 96 Stat. 918.)

* * * * *

SUBCHAPTER III—LIMITATIONS, EXCEPTIONS, AND PENALTIES

§ 1341. Limitations on expending and obligating amounts

(a)(1) An officer or employee of the United States Government or of the District of Columbia government may not—

(A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; or

(B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.

(2) This subsection does not apply to a corporation getting amounts to make loans (except paid in captial amounts) without legal liability of the United States Government.

(b) An article to be used by an executive department in the District of Columbia that could be bought out of an appropriation made to a regular contingent fund of the department may not be bought out of another amount available for obligation.
(Pub. L. 97–258, Sept. 13, 1982, 96 Stat. 923.)

EXPLANATORY NOTE

Popular Name; Derivation. Sections 1341-42, 134a-51, and 1511-19 of title 31 are popularly known as the Anti-Deficiency Act. They derive from R. S. § 3679 and the former 31 U.S.C. § 665.

§ 1342. Limitation on voluntary services

An officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property. This section does not apply to a corporation getting amounts to make loans (except paid in capital amounts) without legal liability of the United States Government.
(Pub. L. 97–258, Sept. 13, 1982, 96 Stat. 923.)

* * * * *

§ 1345. Expenses of meetings

Except as specifically provided by law, an appropriation may not be used for travel, transportation, and subsistence expenses for a meeting. This section does not prohibit—

(1) an agency from paying the expenses of an officer or employee of the United States Government carrying out an official duty; and

* * * * *

(Pub. L. 97–258, Sept. 13, 1982, 96 Stat. 925.)

§ 1346. Commissions, councils, boards, and interagency and similar groups

(a) Except as provided in this section—

(1) public money and appropriations are not available to pay—

(A) the pay or expenses of a commission, council, board, or similar group, or a member of that group;

(B) expenses related to the work or the results of work or action of that group; or

(C) for the detail or cost of personal services of an officer or employee from an executive agency in connection with that group; and

(2) an accounting or disbursing official, absent a special appropriation to pay the account or charge, may not allow or pay an account or charge related to that group.

(b) Appropriations of an executive agency are available for the expenses of an interagency group conducting activities of interest common to executive agencies when the group includes a representative of the agency. The representatives receive no additional pay because of membership in the group. An officer or empolyee of an executive agency not a representative of the group may not receive additional pay for providing services for the group.

(c) Subject to section 1347 of this title, this section does not apply to—

(1) commissions, councils, boards, or similar groups authorized by law;

* * * * *

(Pub. L. 97–258, Sept. 13, 1982, 96 Stat. 925.)

§ 1347. Appropriations or authorizations required for agencies in existence for more than one year

(a) An agency in existence for more than one year may not use amounts otherwise available for obligation to pay its expenses without a specific appropriation or specific authorization by law. If the principal duties and powers of the agency are substantially the same as or similar to the duties and powers of an agency established by executive order, the agency established later is deemed to have been in existence from the date the agency established by the order came into existence.

(b) Except as specifically authorized by law, another agency may not use amounts available for obligation to pay expenses to carry out duties and powers substantially the same as or similar to the principal duties and powers of an agency that is prohibited from using amounts under this section.
(Pub. L. 97–258, Sept. 13, 1982, 96 Stat. 925.)

* * * * *

§ 1349. Adverse personnel actions

(a) An officer or employee of the United States Government or of the District of Columbia government violating section 1341(a) or 1342 of this title shall be subject to appropriate administrative discipline including, when circumstances warrant, suspension from duty without pay or removal from office.

(b) An officer or employee who willfully uses or authorizes the use of a passenger motor vehicle or aircraft owned or leased by the United States Government (except for an official purpose authorized by section 1344 of this title) or otherwise violates section 1344 shall be suspended without pay by the head of the agency. The officer or employee shall be suspended for at least one month, and when circumstances warrant, for a longer period or summarily removed from office.

(Pub. L. 97–258, Sept. 13, 1982, 96 Stat. 926.)

§ 1350. Criminal penalty

An officer or employee of the United States Government or of the District of Columbia government knowingly and willfully violating section 1341(a) or 1342 of this title shall be fined not more than $5,000, imprisoned for not more than 2 years, or both.

(Pub. L. 97–258, Sept. 13, 1982, 96 Stat. 926.)

§ 1351. Reports on violations

If an officer or employee of an executive agency or an officer or employee of the District of Columbia government violates section 1341(a) or 1342 of this title, the head of the agency or the Mayor of the District of Columbia, as the case may be, shall report immediately to the President and Congress all relevant facts and a statement of actions taken.

(Pub. L. 97–258, Sept. 13, 1982, 96 Stat. 926.)

CHAPTER 15 — APPROPRIATION ACCOUNTING

* * * * *

SUBCHAPTER II—APPORTIONMENT

§ 1511. Definition and application

(a) In this subchapter, "appropriations" means—

(1) appropriated amounts;

(2) funds; and

(3) authority to make obligations by contract before appropriations.

(b) This subchapter does not apply to—

(1) amounts (except amounts for administrative expenses) available—

(A) for price support and surplus removal of agricultural commodities; and

(B) under section 32 of the Act of August 24, 1935 (7 U.S.C. 612c);

(2) a corporation getting amounts to make loans (except paid in capital amounts) without legal liability on the part of the United States Government; and

(3) the Senate, the House of Representatives, a committee of Congress, a member, officer, employee, or office of either House of Congress, or the Office of the Architect of the Capitol or an officer or employee of that Office.

(Pub. L. 97–258, Sept. 13, 1982, 96 Stat. 928.)

§ 1512. Apportionment and reserves

(a) Except as provided in this subchapter, an appropriation available for obligation for a definite period shall be apportioned to prevent obligation or expenditure at a rate that would indicate a necessity for a deficiency or supplemental appropriation for the period. An appropriation for an indefinite period and authority to make obligations by contract before appropriations shall be apportioned to achieve the most effective and economical use. An apportionment may be reapportioned under this section.

(b)(1) An appropriation subject to apportionment is apportioned by—

(A) months, calendar quarters, operating seasons, or other time periods;

(B) activities, functions, projects, or objects; or

(C) a combination of the ways referred to in clauses (A) and (B) of this paragraph.

(2) The official designated in section 1513 of this title to make apportionments shall apportion an appropriation under paragraph (1) of this subsection as the official considers appropriate. Except as specified by the official, an amount apportioned is available for obligation under the terms of the appropriation on a cumulative basis unless reapportioned.

(c)(1) In apportioning or reapportioning an appropriation, a reserve may be established only—

(A) to provide for contingencies;

(B) to achieve savings made possible by or through changes in requirements or greater efficiency of operations; or

(C) as specifically provided by law.

(2) A reserve established under this subsection may be changed as necessary to carry out the scope and objectives of the appropriation concerned. When an official designated in section 1513 of this title to make apportionments decides that an amount reserved will not be required to carry out the objectives and scope of the appropriation concerned, the official shall recommend the rescission of the amount in the way provided in chapter 11 of this title for appropriation requests. Reserves established under this section shall be reported to Congress as provided in the Impoundment Control Act of 1974 (2 U.S.C. 681 et seq.).

(d) An apportionment or a reapportionment shall be reviewed at least 4 times a year by the official designated in section 1513 of this title to make apportionments.

(Pub. L. 97–258, Sept. 13, 1982, 96 Stat. 929.)

§ 1513. Officials controlling apportionments

(a) The official having administrative control of an appropriation available to the legislative branch, the judicial branch, the United States International Trade Commission, or the District of Columbia government that is required to be apportioned under section 1512 of this title shall apportion the appropriation in writing. An appropriation shall be apportioned not later than the later of the following:

(1) 30 days before the beginning of the fiscal year for which the appropriation is available; or

(2) 30 days after the date of enactment of the law by which the appropriation is made available.

(b)(1) The President shall apportion in writing an appropriation available to an executive agency (except the Commission) that is required to be apportioned under section 1512 of this title. The head of each executive agency to which the appropriation is available shall submit to the President information required for the apportionment in the form and the way and at the time specified by the President. The information shall be submitted not later than the later of the following:

(A) 40 days before the beginning of the fiscal year for which the appropriation is available; or

(B) 15 days after the date of enactment of the law by which the appropriation is made available.

(2) The President shall notify the head of the executive agency of the action taken in apportioning the appropriation under paragraph (1) of this subsection not later than the later of the following:

(A) 20 days before the beginning of the fiscal year for which the appropriation is available; or

(B) 30 days after the date of enactment of the law by which the appropriation is made available.

(c) By the first day of each fiscal year, the head of each executive department of the United States Government shall apportion among the major organizational units of the department the maximum amount to be expended by each unit during the fiscal year out of each contingent fund appropriated for the entire year for the department. Each amount may be changed during the fiscal year only by written direction of the head of the department. The direction shall state the reasons for the change.

(d) An appropriation apportioned under this subchapter may be divided and subdivided administratively within the limits of the apportionment.

(e) This section does not affect the initiation and operation of agricultural price support programs.

(Pub. L. 97–258, Sept. 13, 1982, 96 Stat. 930.)

§ 1514. Administrative division of apportionments

(a) The official having administrative control of an appropriation available to the legislative branch, the judicial branch, the United States International Trade Commission, or the District of Columbia government, and, subject to the approval of the President, the head of each executive agency (except the Commission) shall prescribe by regulation a system of administrative control not inconsistent with accounting procedures prescribed under law. The system shall be designated to—

(1) restrict obligations or expenditures from each appropriation to the amount of apportionments or reapportionments of the appropriation; and

(2) enable the official or the head of the executive agency to fix responsibility for an obligation or expenditure exceeding an apportionment or reapportionment.

(b) To have a simplified system for administratively dividing appropriations, the head of each executive agency (except the Commission) shall work toward the objective of financing each operating unit, at the highest practical level, from not more than one administrative division for each appropriation affecting the unit.

(Pub. L. 97–258, Sept. 13, 1982, 96 Stat. 930.)

§ 1515. Authorized apportionments necessitating deficiency or supplemental appropriations

(a) An appropriation required to be apportioned under section 1512 of this title may be apportioned on a basis that indicates a necessity for a deficiency or supplemental appropriation to the extent necessary to permit payment of pay increases for prevailing rate employees whose pay is fixed and adjusted under subchapter IV of chapter 53 of title 5.

(b)(1) Except as provided in subsection (a) of this section, an official may make, and the head of an executive agency may request, an apportionment under section 1512 of this title that would indicate a necessity for a deficiency or supplemental appropriation only when the official or agency head decides that the action is required because of—

(A) a law enacted after submission to Congress of the estimates for an appropriation that requires an expenditure beyond administrative control; or

(B) an emergency involving the safety of human life, the protection of property, or the immediate welfare of individuals when an appropriation that would allow the United States Government to pay, or contribute to, amounts required to be paid to individuals in specific amounts fixed by law or under formulas prescribed by law, is insufficient.

(2) If an official making an apportionment decides that an apportionment would indicate a necessity for a deficiency or supplemental appropriation, the official shall submit immediately a detailed report of the facts to Congress. The report shall be referred to in submitting a proposed deficiency or supplemental appropriation.

(Pub. L. 97–258, Sept. 13, 1982, 96 Stat. 931.)

§ 1516. Exemptions

An official designated in section 1513 of this title to make apportionments may exempt from apportionment—

(1) a trust fund or working fund if an expenditure from the fund has no significant effect on the financial operations of the United States Government;

(2) a working capital fund or a revolving fund established for intragovernmental operations;

(3) receipts from industrial and power operations available under law; and

(4) appropriations made specifically for—

(A) interest on, or retirement of, the public debt;

(B) payment of claims, judgments, refunds, and drawbacks;

(C) items the President decides are of a confidential nature;

(D) payment under a law requiring payment of the total amount of the appropriation to a designated payee; and

(E) grants to the States under the Social Security Act (42 U.S.C. 301 et seq.).

(Pub. L. 97-258, Sept. 13, 1982 96 Stat. 931.)

§ 1517. Prohibited obligations and expenditures

(a) An officer or employee of the United States Government or of the District of Columbia government may not make or authorize an expenditure or obligation exceeding—

(1) an apportionment; or

(2) the amount permitted by regulations prescribed under section 1514(a) of this title.

(b) If an officer or employee of an executive agency or of the District of Columbia government violates subsection (a) of this section, the head of the executive agency or the Mayor of the District of Columbia, as the case may be, shall report immediately to the President and Congress all relevant facts and a statement of actions taken.

(Pub. L. 97-258, Sept. 13, 1982, 96 Stat. 932.)

§ 1518. Adverse personnel actions.

An officer or employee of the United States Government or of the District of Columbia government violating section 1517(a) of this title shall be subject to appropriate administrative discipline including, when circumstances warrant, suspension from duty without pay or removal from office.

(Pub. L. 97-258, Sept. 13, 1982, 96 Stat. 932.)

§ 1519. Criminal penalty

An officer or employee of the United States Government or of the District of Columbia government knowingly and willfully violating section 1517(a) of this title shall be fined not more than $5,000, imprisoned for not more than 2 years, or both.

(Pub. L. 97-258, Sept. 13, 1982, 96 Stat. 932.)

SUBCHAPTER III—TRANSFERS AND REIMBURSEMENTS

* * * * *

§ 1535. Agency agreements.

(a) The head of an agency or major organizational unit within an agency may place an order with a major organizational unit within the same agency or another agency for goods or services if—

(1) amounts are available:

(2) the head of the ordering agency or unit decides the order is in the best interest of the United States Government;

(3) the agency or unit to fill the order is able to provide or get by contract the ordered goods or services; and

(4) the head of the agency decides ordered goods or services cannot be provided by contract as conveniently or cheaply by a commercial enterprise.

(b) Payment shall be made promptly by check on the written request of the agency or unit filling the order. Payment may be in advance or on providing the goods or services ordered and shall be for any part of the estimated or actual costs as determined by the agency or unit filling the order. A bill submitted or a request for payment is not subject to audit or certification in advance of payment. Proper adjustment of amounts paid in advance shall be made as agreed to by the heads of the agencies or units on the basis of the actual cost of goods or services provided.

(c) A condition or limitation applicable to amounts for procurement of an agency or unit placing an order or making a contract under this section applies to the placing of the order or the making of the contract.

(d) An order placed or agreement made under this section obligates an appropriation of the ordering agency or unit. The amount obligated is deobligated to the extent that the agency or unit filling the order has not incurred obligations, before the end of the period of availability of the appropriation, in—

(1) providing goods or services; or

(2) making an authorized contract with another person to provide the requested goods or services.

(e) This section does not—

(1) authorize orders to be placed for goods or services to be provided by convict labor; or

(2) affect other laws about working funds.

(Pub. L. 97–258, Sept. 13, 1982, 96 Stat. 933; Pub. L. 98–216, § 1(2), Feb. 14, 1984, 98 Stat. 3.)

EXPLANATORY NOTE

Popular Name; Derivation. This section is derived *inter alia* from section 601 of the Act of June 30, 1932, 47 Stat. 417, formerly codified as 31 U.S.C. § 686, which is popularly known as the Economy Act.

§ 1536. Crediting payments from purchases between executive agencies

(a) An advance payment made on an order under section 1535 of this title is credited to a special working fund that the Secretary of the Treasury considers necessary to be established. Except as provided in this section, any other payment is credited to the appropriation or fund against which charges were made to fill the order.

(b) An amount paid under section 1535 of this title may be expended in providing goods or services or for a purpose specified for the appropriation of fund credited. Where goods are provided from stocks on hand, the amount received in payment is credited so as to be available to replace the goods unless—

(1) another law authorizes the amount to be credited to some other appropriation or fund; or

(2) the head of the executive agency filling the order decides that replacement is not necessary, in which case, the amount received is deposited in the Treasury as miscellaneous receipts.

(c) This section does not affect other laws about working funds.

(Pub. L. 97–258, Sept. 13, 1982, 96 Stat. 934.)

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SUBTITLE III—FINANCIAL MANAGEMENT

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CHAPTER 33—DEPOSITING, KEEPING, AND PAYING MONEY

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SUBCHAPTER II—PAYMENTS

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§ 3324. Advances

(a) Except as provided in this section, a payment under a contract to provide a service or deliver an article for the United States Government may not be more than the value of the service already provided or the article already delivered.

(b) An advance of public money may be made only if it is authorized by—

(1) a specific appropriation or other law; or

(2) the President to be made to—

(A) a disbursing official if the President decides the advance is necessary to carry out—

(i) the duties of the official promptly and faithfully; and

(ii) an obligation of the Government; or

(B) an individual serving in the armed forces at a distant station if the President decides the advance is necessary to disburse regularly pay and allowances.

(c) Before the Secretary of the Treasury acts on a requisition for an advance, the Comptroller General shall act on the requisition under section

3522 of this title. The Comptroller General does not countersign a requisition for an advance.

(d) The head of an agency may pay in advance from appropriations available for the purpose—

(1) to the Secretary of the Army, charges for messages sent by the Secretary of the Army for the head of the agency, including charges for—

(A) payment of tolls of commercial carriers;

(B) leasing facilities for sending messages; and

(C) installing and maintaining facilities for sending messages; and

(2) charges for a publication printed or recorded in any way for the auditory or visual use of the agency.

(Pub. L. 97-258, Sept. 13, 1982, 96 Stat. 950.)

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CHAPTER 35—ACCOUNTING AND COLLECTION

SUBCHAPTER I—GENERAL

§ 3501. Definition

In this chapter, "executive agency" does not include (except in section 3513 of this title) a corporation, agency, or instrumentality subject to chapter 91 of this title.

(Pub. L. 97-258, Sept. 13, 1982, 96 Stat. 959.)

SUBCHAPTER II–ACCOUNTING REQUIREMENTS, SYSTEMS, AND INFORMATION

§ 3511. Prescribing accounting requirements and developing accounting systems

(a) The Comptroller General shall prescribe the accounting principles, standards, and requirements that the head of each executive agency shall observe. Before prescribing the principles, standards, and requirements, the Comptroller General shall consult with the Secretary of the Treasury and the President on their accounting, financial reporting, and budgetary needs, and shall consider the needs of the heads of the other executive agencies.

(b) Requirements prescribed under subsection (a) of this section shall—

(1) provide for suitable integration between the accounting process of each executive agency and the accounting of the Department of the Treasury;

(2) allow the head of each agency to carry out section 3512 of this title; and

(3) provide a method of—

(A) integrated accounting for the United States Government;

(B) complete disclosure of the results of the financial operations of each agency and the Government; and

(C) financial information and control the President and Congress require to carry out their responsibilities.

(c) Consistent with subsections (a) and (b) of this section—

(1) the authority of the Comptroller General continues under section 205(b) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 486(b)); and

(2) the Comptroller General may prescribe the forms, systems, and procedures that the judicial branch of the Government (except the Supreme Court) shall observe.

(d) The Comptroller General, the Secretary, and the President shall conduct a continuous program for improving accounting and financial reporting in the Government.

(Pub. L. 97–258, Sept. 13, 1982, 96 Stat. 959.)

EXPLANATORY NOTE

Short title; Derivation. Sections 3511–14 and 3523–24 derive from former sections 66 and 67 of title 31 of the U.S. Code, which in turn derived principally from the Accounting and Auditing Act of 1950, ch. 946, pt. II, 64 Stat. 835.

§ 3512. Executive agency accounting systems

(a) The head of each executive agency shall establish and maintain systems of accounting and internal controls that provide—

(1) complete disclosure of the financial results of the activities of the agency;

(2) adequate financial information the agency needs for management purposes;

(3) effective control over, and accountability for, assets for which the agency is responsible, including internal audit;

(4) reliable accounting results that will be the basis for—

(A) preparing and supporting the budget requests of the agency;

(B) controlling the carrying out of the agency budget; and

(C) providing financial information the President requires under section 1104(e) of this title; and

(5) suitable integration of the accounting of the agency with the central accounting and reporting responsibilities of the Secretary of the Treasury under section 3513 of this title.

(b)(1) To ensure compliance with subsection (a)(3) of this section and consistent with standards the Comptroller General prescribes, the head of each executive agency shall establish internal accounting and administrative controls that reasonably ensure that—

(A) obligations and costs comply with applicable law;

(B) all assets are safeguarded against waste, loss, unauthorized use, and misappropriation; and

(C) revenues and expenditures applicable to agency operations are recorded and accounted for properly so that accounts and reliable financial and statistical reports may be prepared and accountability of the assets may be maintained.

(2) Standards the Comptroller General prescribes under this subsection shall include standards to ensure the prompt resolution of all audit findings.

(c)(1) In consultation with the Comptroller General, the Director of the Office of Management and Budget—

(A) shall establish by December 31, 1982, guidelines that the head of each executive agency shall follow in evaluating the internal accounting and administrative control systems of the agency to decide whether the systems comply with subsection (b) of this section; and

(B) may change a guideline when considered necessary.

(2) By December 31 of each year (beginning in 1983), the head of each executive agency, based on an evaluation conducted according to guidelines prescribed under paragraph (1) of this subsection, shall prepare a statement on whether the systems of the agency comply with subsection (b) of this section, including—

(A) if the head of an executive agency decides the systems do not comply with subsection (b) of this section, a report identifying any material weakness in the systems and describing the plans and schedule for correcting the weakness; and

(B) a separate report on whether the accounting system of the agency conforms to the principles, standards, and requirements the Comptroller General prescribes under section 3511(a) of this title.

(3) The head of each executive agency shall sign the statement and reports required by this subsection and submit them to the President and Congress. The statement and reports are available to the public, except that information shall be deleted from a statement or report before it is made available if the information specifically is—

(A) prohibited from disclosure by law; or

(B) required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs.

(d) To assist in preparing a cost-based budget under section 1108(b) of this title and consistent with principles and standards the Comptroller General prescribes, the head of each executive agency shall maintain the accounts of the agency on an accrual basis to show the resources, liabilities, and costs of operations of the agency. An accounting system under this subsection shall include monetary property accounting records.

(e) The Comptroller General shall—

(1) cooperate with the head of each executive agency in developing an accounting system for the agency; and

(2) approve the system when the Comptroller General considers it to be adequate and in conformity with the principles, standards, and requirements prescribed under section 3511 of this title.

(f) The Comptroller General shall review the accounting systems of each executive agency. The results of a review shall be available to the head of the executive agency, the Secretary, and the President. The Comptroller General shall report to Congress on a review when the Comptroller General considers it proper.

(Pub. L. 97–258, Sept. 13, 1982, 96 Stat. 959; Pub. L. 97–452, § 1(12), Jan. 12, 1983, 96 Stat. 2468.)

§ 3513. Financial reporting and accounting system

(a) The Secretary of the Treasury shall prepare reports that will inform the President, Congress, and the public on the financial operations of the United States Government. The reports shall include financial information the President requires. The head of each executive agency shall give the Secretary reports and information on the financial conditions and operations of the agency the Secretary requires to prepare the reports.

(b) The Secretary may—

(1) establish facilities necessary to prepare the reports; and

(2) reorganize the accounting functions and procedures and financial reports of the Department of the Treasury to develop an effective and coordinated system of accounting and financial reporting in the Department that will integrate the accounting results for the Department and be the operating center for consolidating accounting results of other executive agencies with accounting results of the Department.

(c) The Comptroller General shall—

(1) cooperate with the Secretary in developing and establishing the reporting and accounting system under this section; and

(2) approve the system when the Comptroller General considers it to be adequate and in conformity with the principles, standards, and requirements prescribed under section 3511 of this title.

(Pub. L. 97–258, Sept. 13, 1982, 96 Stat. 960.)

§ 3514. Discontinuing certain accounts maintained by the Comptroller General

The Comptroller General may discontinue an agency appropriation, expenditure, limitation, receipt, or personal ledger account maintained by the Comptroller General when the Comptroller General believes that the accounting system and internal controls of the agency will allow the Comptroller General to carry out the functions related to the account.

(Pub. L. 97–258, Sept. 13, 1982, 96 Stat. 960.)

SUBCHAPTER III—AUDITING AND SETTLING ACCOUNTS

§ 3521. Audits by agencies

(a) Each account of an agency shall be audited administratively before being submitted to the Comptroller General. The head of each agency shall prescribe regulations for conducting the audit and designate a place at which the audit is to be conducted. However, a disbursing official of an executive agency may not administratively audit vouchers for which the official is responsible. With the consent of the Comptroller General, the head of the agency may waive any part of an audit.

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(Pub. L. 97–258, Sept. 13, 1982, 96 Stat. 961.)

* * * * *

§ 3523. General audit authority of the Comptroller General

(a) Except as specifically provided by law, the Comptroller General shall audit the financial transactions of each agency. In deciding on auditing procedures and the extent to which records are to be inspected, the Comptroller General shall consider generally accepted auditing principles, including the effectiveness of accounting organizations and systems, internal audit and control, and related administrative practices of each agency.

* * * * *

(Pub. L. 97–258, Sept. 13, 1982, 96 Stat. 962.)

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§ 3526. Settlement of accounts

(a) The Comptroller General shall settle all accounts of the United States Government and supervise the recovery of all debts finally certified by the Controller General as due the Government.

(b) A decision of the Comptroller General under section 3529 of this title is conclusive on the Comptroller General when settling the account containing the payment.

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(Pub. L. 97–258, Sept. 13, 1982, 96 Stat. 964.)

* * * * *

§ 3529. Requests for decisions of the Comptroller General

(a) A disbursing or certifying official or the head of an agency may request a decision from the Comptroller General on a question involving—

(1) a payment the disbursing official or head of the agency will make; or

(2) a voucher presented to a certifying official for certification.

(b) The Comptroller General shall issue a decision requested under this section.

(Pub. L. 97–258, Sept. 13, 1982, 96 Stat. 967.)

* * * * *

CHAPTER 37—CLAIMS

SUBCHAPTER I—GENERAL

§ 3701. Definitions and application

(a) In this chapter—

(1) "administrative offset" means withholding money payable by the United States Government to, or held by the Government for, a person to satisfy a debt the person owes the Government.

(2) "calendar quarter" means a 3-month period beginning on January 1, April 1, July 1, or October 1.

(3) "consumer reporting agency" means—

(A) a consumer reporting agency as that term is defined in section 603(f) of the Fair Credit Reporting Act (15 U.S.C. 1681a(f)); or

(B) a person that, for money or on a cooperative basis, regularly—

(i) gets information on consumers to give the information to a consumer reporting agency; or

(ii) serves as a marketing agent under an arrangement allowing a third party to get the information from a consumer reporting agency.

(4) "executive or legislative agency" means a department, agency , or instrumentality in the executive or legislative branch of the Government.

(5) "military department" means the Departments of the Army, Navy, and Air Force.

(6) "system of records" has the same meaning given that term in section 552a(a)(5) of title 5.

(7) "uniformed services" means the Army, Navy, Air Force, Marine Corps, Coast Guard, Commissioned Corps of the National Oceanic and Atmospheric Administration, and Commissioned Corps of the Public Health Service.

(b) In subchapter II of this chapter, "claim" includes amounts owing on account of loans insured or guaranteed by the Government and other amounts due the Government.

(c) In sections 3716 and 3717 of this title, "person" does not include an agency of the United States Government, of a State government, or of a unit of general local government.

(d) Sections 3711(f) and 3716–3719 of this title do not apply to a claim or debt under, or to an amount payable under, the Internal Revenue Code of 1954 (26 U.S.C. 1 et seq.), the Social Security Act (42 U.S.C. 301 et seq.), or the tariff laws of the United States.

(Pub. L. 97–258, Sept. 13, 1982, 96 Stat. 970; Pub. L. 97–452, § 1(13)(A), Jan. 12. 1983, 96 Stat. 2469.)

§ 3702. Authority of the Comptroller General to settle claims

(a) Except as provided in this chapter or another law, the Comptroller General shall settle all claims of or against the United States Government. A claim that was not administratively examined before submission to the

Comptroller General shall be examined by 2 officers or employees of the General Accounting Office independently of each other.

* * * * *

(Pub. L. 97–258, Sept. 13, 1982, 96 Stat. 970; Pub. L. 97–452, § 1(14), Jan. 12. 1983, 96 Stat. 2470.)

SUBCHAPTER II—CLAIMS OF THE UNITED STATES GOVERNMENT

§ 3711. Collection and compromise

(a) The head of an executive or legislative agency—

(1) shall try to collect a claim of the United States Government for money or property arising out of the activities of, or referred to, the agency;

(2) may compromise a claim of the Government of not more than $20,000 (excluding interest) that has not been referred to another executive or legislative agency for further collection action; and

(3) may suspend or end collection action on a claim referred to in clause (2) of this subsection when it appears that no person liable on the claim has the present or prospective ability to pay a significant amount of the claim or the cost of collecting the claim is likely to be more than the amount recovered.

(b) The Comptroller General has the same authority that the head of the agency has under subsection (a) of this section when the claim is referred to the Comptroller General for further collection action. Only the Comptroller General may compromise a claim arising out of an exception the Comptroller General makes in the account of an accountable official.

(c)(1) The head of an executive or legislative agency may not act under subsection (a)(2) or (3) of this section on a claim that appears to be fraudulent, false, or misrepresented by a party with an interest in the claim, or that is based on conduct in violation of the antitrust laws.

* * * * *

(d) A compromise under this section is final and conclusive unless gotten by fraud, misrepresentation, presenting a false claim, or mutual mistake of fact. An accountable official is not liable for an amount paid or for the value of property lost or damaged if the amount or value is not recovered because of a compromise under this section.

(e) The head of an executive or legislative agency acts under—

(1) regulations prescribed by the head of the agency; and

(2) standards that the Attorney General and the Comptroller General may prescribe jointly.

(f)(1) When trying to collect a claim of the Government under a law except the Internal Revenue Code of 1954 (26 U.S.C. 1 et seq.), the head of an executive or legislative agency may disclose to a consumer reporting agency information from a system of records that an individual is responsible for a claim if—

(A) notice required by section 552a(e)(4) of title 5 indicates that information in the system may be disclosed to a consumer reporting agency;

(B) the head of the agency has reviewed the claim and decided that the claim is valid and overdue;

(C) the head of the agency has notified the individual in writing—

(i) that payment of the claim is overdue;

(ii) that, within not less than 60 days after sending the notice, the head of the agency intends to disclose to a consumer reporting agency that the individual is responsible for the claim;

(iii) of the specific information to be disclosed to the consumer reporting agency; and

(iv) of the rights the individual has to a complete explanation of the claim, to dispute information in the records of the agency about the claim, and to administrative repeal or review of the claim;

(D) the individual has not—

(i) repaid or agreed to repay the claim under a written repayment plan that the individual has signed and the head of the agency has agreed to; or

(ii) filed for review of the claim under paragraph (2) of this subsection;

(E) the head of the agency has established procedures to—

(i) disclose promptly, to each consumer reporting agency to which the original disclosure was made, a substantial change in the condition or amount of the claim;

(ii) verify or correct promptly information about the claim on request of a consumer reporting agency for verification of information disclosed; and

(iii) get satisfactory assurances from each consumer reporting agency that the agency is complying with all laws of the United States related to providing consumer credit information; and

(F) the information disclosed to the consumer reporting agency is limited to—

(i) information necessary to establish the identity of the individual, including name, address, and taxpayer identification number;

(ii) the amount, status, and history of the claim; and

(iii) the agency or program under which the claim arose.

(2) Before disclosing information to a consumer reporting agency under paragraph (1) of this subsection and at other times allowed by law, the head of an executive or legislative agency shall provide, on request of an individual alleged by the agency to be responsible for the claim, for a review of the obligation of the individual, including an opportunity for reconsideration of the initial decision on the claim.

(3) Before disclosing information to a consumer reporting agency under paragraph (1) of this subsection, the head of an executive or legislative

agency shall take reasonable action to locate an individual for whom the head of the agency does not have a current address to send the notice under paragraph (1)(C).

(Pub. L. 97–258, Sept. 13, 1982, 96 Stat. 971; Pub. L. 97–452, § 1(15), Jan. 12, 1983, 96 Stat. 2470.)

* * * * *

§ 3716. Administrative offset

(a) After trying to collect a claim from a person under section 3711(a) of this title, the head of an executive or legislative agency may collect the claim by administrative offset. The head of the agency may collect by administrative offset only after giving the debtor—

(1) written notice of the type and amount of the claim, the intention of the head of the agency to collect the claim by administrative offset, and an explanation of the rights of the debtor under this section;

(2) an opportunity to inspect and copy the records of the agency related to the claim;

(3) an opportunity for a review within the agency of the decision of the agency related to the claim; and

(4) an opportunity to make a written agreement with the head of the agency to repay the amount of the claim.

(b) Before collecting a claim by administrative offset under subsection (a) of this section, the head of an executive or legislative agency must prescribe regulations on collecting by administrative offset based on—

(1) the best interests of the United States Government;

(2) the likelihood of collecting a claim by administrative offset; and

(3) for collecting a claim by administrative offset after the 6-year period for bringing a civil action on a claim under section 2415 of title 28 has expired, the cost effectiveness of leaving a claim unresolved for more than 6 years.

(c) This section does not apply—

(1) to a claim under this subchapter that has been outstanding for more than 10 years; or

(2) when a statute explicitly provides for or prohibits using administrative offset to collect the claim or type of claim involved.

(Added Pub. L. 97–452, § 1(16)(A), Jan. 12, 1983, 96 Stat. 2471.)

§ 3717. Interest and penalty on claims

(a)(1) The head of an executive or legislative agency shall charge a minimum annual rate of interest on an outstanding debt on a United States Government claim owed by a person that is equal to the average investment rate for the Treasury tax and loan accounts for the 12-month period ending on September 30 of each year, rounded to the nearest whole percentage point. The Secretary of the Treasury shall publish the rate before November 1 of that year. The rate is effective on the first day of the next calendar quarter.

(2) The Secretary may change the rate of interest for a calendar quarter if the average investment rate for the 12-month period ending at the close of the prior calendar quarter, rounded to the nearest whole percentage point, is more or less than the existing published rate by 2 percentage points.

(b) Interest under subsection (a) of this section accrues from the date—

(1) on which notice is mailed after October 25, 1982, if notice was first mailed before October 25, 1982; or

(2) notice of the amount due is first mailed to the debtor at the most current address of the debtor available to the head of the executive or legislative agency, if notice is first mailed after October 24, 1982.

(c) The rate of interest charged under subsection (a) of this section—

(1) is the rate in effect on the date from which interest begins to accrue under subsection (b) of this section; and

(2) remains fixed at that rate for the duration of the indebtedness.

(d) Interest under subsection (a) of this section may not be charged if the amount due on the claim is paid within 30 days after the date from which interest accrues under subsection (b) of this section. The head of an executive or legislative agency may extend the 30-day period.

(e) The head of an executive or legislative agency shall assess on a claim owed by a person—

(1) a charge to cover the cost of processing and handling a delinquent claim; and

(2) a penalty charge of not more than 6 percent a year for failure to pay a part of a debt more than 90 days past due.

(f) Interest under subsection (a) of this section does not accrue on a charge assessed under subsection (e) of this section.

(g) This section does not apply—

(1) if a statute, regulation required by statute loan agreement, or contract prohibits charging interest or assessing charges or explicitly fixes the interest or charges; and

(2) to a claim under a contract executed before October 25, 1982, that is in effect on October 25, 1982.

(h) In conformity with standards prescribed jointly by the Attorney General and the Comptroller General, the head of an executive or legislative agency may prescribe regulations identifying circumstances appropriate to waiving collection of interest and charges under subsections (a) and (e) of this section. A waiver under the regulations is deemed to be compliance with this section.

(Added Pub. L. 97–452, § 1(16)(A), Jan. 12, 1983, 96 Stat. 2472.)

§ 3718. Contracts for collection services

(a) Under conditions the head of an executive or legislative agency considers appropriate, the head of the agency may make a contract with a person for collection services to recover indebtedness owed the United States Government. The contract shall provide that—

(1) the head of the agency retains the authority to resolve a dispute,

compromise a claim, end collection action, and refer a matter to the Attorney General to bring a civil action; and

(2) the person is subject to—

(A) section 552a of title 5, to the extent provided in section 552a(m); and

(B) laws and regulations of the United States Government and State governments related to debt collection practices.

(b) Notwithstanding section 3302(b) of this title, a contract under subsection (a) of this section may provide that a fee a person charges to recover indebtedness owed the United States Government is payable from the amount recovered.

(c) A contract under subsection (a) of this section is effective only to the extent and in the amount provided in an appropriation law. This limitation does not apply in the case of a contract that authorizes a person to collect a fee as provided in subsection (b) of this section.

(d) This section does not apply to the collection of debts under the Internal Revenue Code of 1954 (26 U.S.C. 1 et seq.).

(Added Pub. L. 97–452, § 1(16)(A), Jan. 12, 1983, 96 Stat. 2473; Pub. L. 98–167, Nov. 29, 1983, 97 Stat. 1104.)

§ 3719. Reports on debt collection activities

(a) In consultation with the Secretary of the Treasury and the Comptroller General, the Director of the Office of Management and Budget shall prescribe regulations requiring the head of each agency with outstanding debts to prepare and submit to the Director and the Secretary at least once each year a report summarizing the status of loans and accounts receivable managed by the head of the agency. The report shall contain—

(1) information on—

(A) the total amount of loans and accounts receivable owed the agency and when amounts owed the agency are due to be repaid;

(B) the total amount of receivables and number of claims at least 30 days past due;

(C) the total amount written off as actually uncollectible and the total amount allowed for uncollectible loans and accounts receivable;

(D) the rate of interest charged for overdue debts and the amount of interest charged and collected on debts;

(E) the total number of claims and the total amount collected; and

(F) the number and total amount of claims referred to the Attorney General for settlement and the number and total amount of claims the Attorney General settles;

(2) the information described in clause (1) of this subsection for each program or activity the head of the agency carries out; and

(3) other information the Director considers necessary to decide whether the head of the agency is acting aggressively to collect the claims of the agency.

(b) The Director shall analyze the reports submitted under subsection (a) of this section and shall report annually to Congress on the management

of debt collection activities by the head of each agency, including the information provided the Director under subsection (a).
(Added Pub. L. 97–452, § 1(16)(A), Jan. 12, 1983, 96 Stat. 2473.)

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CHAPTER 39—PROMPT PAYMENT

§ 3901. Definitions and application

(a) In this chapter—

(1) "agency" has the same meaning given that term in section 551(1) of title 5 and includes an entity being operated, and the head of the agency identifies the entity as being operated, only as an instrumentality of the agency to carry out a program of the agency.

(2) "business concern" means—

(A) a person carrying on a trade or business; and

(B) a nonprofit entity operating as a contractor.

(3) "proper invoice" is an invoice containing or accompanied by substantiating documentation the Director of the Office of Management and Budget may require by regulation and the head of the appropriate agency may require by regulation or contract.

(4) the head of an agency is deemed to receive an invoice on the later of the dates that—

(A) the designated payment office or finance center of the agency actually receives a proper invoice; or

(B) the head of the agency accepts the applicable property or service.

(5) a payment is deemed to be made on the date a check for the payment is dated.

(6) a contract to rent property is deemed to be a contract to acquire the property.

(b) This chapter applies to the Tennessee Valley Authority. However, regulations prescribed under this chapter do not apply to the Authority, and the Authority alone is responsible for carrying out this chapter as it applies to contracts of the Authority.
(Added Pub. L. 97–452, § 1(18)(A), Jan. 12, 1983, 96 Stat. 2474.)

§ 3902. Interest penalties

(a) Under regulations prescribed under section 3903 of this title, the head of an agency acquiring property or service from a business concern, who does not pay the concern for each complete delivered item of property or service by the required payment date, shall pay an interest penalty to the concern on the amount of the payment due. The interest shall be computed at the rate the Secretary of the Treasury establishes for interest payments under section 12 of the Contract Disputes Act of 1978 (41 U.S.C. 611). The Secretary shall publish each rate in the Federal Register.

(b) Except as provided in section 3906 of this title, the interest penalty shall be paid for the period beginning on the day after the required payment date and ending on the date on which payment is made. However, a penalty may not be paid if payment for the item is made—

(1) when the item is a meat or meat food product described in section 3903(2) of this title, before the 4th day after the required payment date;

(2) when the item is an agricultural commodity described in section 3903(3) of this title, before the 4th day after the required payment date; or

(3) when the item is not an item referred to in clauses (1) and (2) of this subsection, before the 16th day after the required payment date.

(c) An amount of an interest penalty unpaid after any 30-day period shall be added to the principal amount of the debt, and a penalty accrues thereafter on the added amount.

(d) This section does not authorize the appropriation of additional amounts to pay an interest penalty. The head of an agency shall pay a penalty under this section out of amounts made available to carry out the program for which the penalty is incurred.

(e) A recipient of a grant from the head of an agency may provide in a contract for the acquisition of property or service from a business concern that, consistent with the usual business practices of the recipient and applicable State and local law, the recipient will pay an interest penalty on amounts overdue under the contract under conditions agreed to by the recipient and the concern. The recipient may not pay the penalty from amounts received from an agency. Amounts expended for the penalty may not be counted toward a matching requirement applicable to the grant. An obligation to pay the penalty is not an obligation of the United States Government.

(Added Pub. L. 97–452, § 1(18)(A), Jan. 12, 1983, 96 Stat. 2475; Pub. L. 98–216, § 1(6), Feb. 14, 1984, 98 Stat. 4.)

§ 3903. Regulations

The Director of the Office of Management and Budget shall prescribe regulations to carry out section 3902 of this title. The regulations shall—

(1) provide that the required payment date is—

(A) the date payment is due under the contract for the item of property or service provided; or

(B) 30 days after a proper invoice for the amount due is received if a specific payment date is not established by contract;

* * * * *

(4) provide separate required payment dates for a contract under which property or service is provided in a series of partial executions or deliveries to the extent the contract provides for separate payments for partial execution or delivery; and

(5) require that, within 15 days after an invoice is received, the head of an agency notify the business concern of a defect or impropriety in

the invoice that would prevent the running of the time period specified in clause (1)(B) of this section.
(Added Pub. L. 97–452, § 1(18)(A), Jan. 12, 1983, 96 Stat. 2476.)

§ 3904. Limitations on discount payments

The head of an agency offered a discount by a business concern from an amount due under a contract for property or service in exchange for payment within a specified time may pay the discounted amount only if payment is made within the specified time. The head of the agency shall pay an interest penalty on an amount remaining unpaid in violation of this section. The penalty accrues as provided under sections 3902 and 3903 of this title, except that the required payment date for the unpaid amount is the last day specified in the contract that the discounted amount may be paid.
(Added Pub. L. 97–452, § 1(18)(A), Jan. 12, 1983, 96 Stat. 2476.)

§ 3905. Reports

(a) By the 60th day after the end of each fiscal year, the head of each agency shall submit to the Director of the Office of Management and Budget a report on interest penalty payments made under this chapter during that fiscal year. The report shall include the number, amounts, and frequency of the payments and the reasons the payments were not avoided by prompt payment.

(b) By the 120th day after the end of each fiscal year, the Director shall submit to the Committees on Governmental Affairs, Appropriations, and Small Business of the Senate and the Committees on Government Operations, Appropriations, and Small business of the House of Representatives a report on agency compliance with this chapter. The report shall include a summary of the report of each agency submitted under subsection (a) of this section and an analysis of progress made in reducing interest penalty payments by that agency from prior years.
(Added Pub. L. 97–452, § 1(18)(A), Jan. 12, 1983, 96 Stat. 2476.)

§ 3906. Relationship to other laws

(a) A claim for an interest penalty not paid under this chapter may be filed under section 6 of the Contract Disputes Act of 1978 (41 U.S.C. 605).

(b)(1) An interest penalty under this chapter does not continue to accrue—

(A) after a claim for a penalty is filed under the Contract Disputes Act of 1978 (41 U.S.C. 601 et seq.); or

(B) for more than one year.

(2) Paragraph (1) of this subsection does not prevent an interest penalty from accruing under section 12 of the Contract Disputes Act of 1978 (41 U.S.C. 611) after a penalty stops accruing under this chapter. A penalty accruing under section 12 may accrue on an unpaid contract payment and on the unpaid penalty under this chapter.

(c) Except as provided in section 3904 of this title, this chapter does not require an interest penalty on a payment that is not made because of a dispute between the head of an agency and a business concern over the amount of payment or compliance with the contract. A claim related to the dispute, and interest payable for the period during which the dispute is being resolved, is subject to the Contract Disputes Act of 1978 (41 U.S.C. 601 et seq.).
(Added Pub. L. 97–452, § 1(18)(A), Jan. 12. 1983, 96 Stat. 2477.)

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SUBTITLE V—GENERAL ASSISTANCE ADMINISTRATION

* * * * *

CHAPTER 63—USING PROCUREMENT CONTRACTS AND GRANT AND COOPERATIVE AGREEMENTS

§ 6301. Purposes

The purposes of this chapter are to—

(1) promote a better understanding of United States Government expenditures and help eliminate unnecessary administrative requirements on recipients of Government awards by characterizing the relationship between executive agencies and contractors, States, local governments, and other recipients in acquiring property and services and in providing United States Government assistance;

(2) prescribe criteria for executive agencies in selecting appropriate legal instruments to achieve—

(A) uniformity in their use by executive agencies;

(B) a clear definition of the relationships they reflect; and

(C) a better understanding of the responsibilities of the parties to them; and

(3) promote increased discipline in selecting and using procurement contracts, grant agreements, and cooperative agreements, maximize competition in making procurement contracts, and encourage competition in making grants and cooperative agreements.

(Pub. L. 97–258, Sept. 13, 1982, 96 Stat. 1003.)

§ 6302. Definitions

In this chapter—

(1) "executive agency" does not include a mixed-ownership Government corporation.

(2) "grant agreement" and "cooperative agreement" do not include an agreement under which is provided only—

(A) direct United States Government cash assistance to an individual;

(B) a subsidy;

(C) a loan;

(D) a loan guarantee; or

(E) insurance.

(3) "local government" means a unit of government in a State, a local public authority, a special district, an intrastate district, a council of governments, a sponsor group representative organization, an interstate entity, or another instrumentality of a local government.

(4) "other recipient" means a person or recipient (except a State or local government) authorized to receive United States Government assistance or procurement contracts and includes a charitable or educational institution.

(5) "State" means a State of the United States, the District of Columbia, a territory or possession of the United States, an agency or instrumentality of a State, and a multi-State, regional, or interstate entity having governmental duties and powers.

(Pub. L. 97-258, Sept. 13, 1982, 96 Stat. 1003.)

§ 6303. Using procurement contracts

An executive agency shall use a procurement contract as the legal instrument reflecting a relationship between the United States Government and a State, a local government, or other recipient when—

(1) the principal purpose of the instrument is to acquire (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government; or

(2) the agency decides in a specific instance that the use of a procurement contract is appropriate.

(Pub. L. 97-258, Sept. 13, 1982, 96 Stat. 1004.)

§ 6304. Using grant agreements

An executive agency shall use a grant agreement as the legal instrument reflecting a relationship between the United States Government and a State, a local government, or other recipient when—

(1) the principal purpose of the relationship is to transfer a thing of value to the State or local government or other recipient to carry out a public purpose of support or stimulation authorized by a law of the United States instead of acquiring (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government; and

(2) substantial involvement is not expected between the executive agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement.

(Pub. L. 97-258, Sept. 13, 1982, 96 Stat. 1004.)

§ 6305. Using cooperative agreements

An executive agency shall use a cooperative agreement as the legal instrument reflecting a relationship between the United States Government and a State, a local government, or other recipient when—

(1) the principal purpose of the relationship is to transfer a thing of value to the State, local government, or other recipient to carry out a

public purpose of support or stimulation authorized by a law of the United States instead of acquiring (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government; and

(2) substantial involvement is expected between the executive agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement.

(Pub. L. 97–258, Sept. 13, 1982, 96 Stat. 1004.)

§ 6306. Authority to vest title in tangible personal property for research

The head of an executive agency may vest title in tangible personal property in a nonprofit institution of higher education or in a nonprofit organization whose primary purpose is conducting scientific research—

(1) when the property is bought with amounts provided under a procurement contract, grant agreement, or cooperative agreement with the institution or organization to conduct basic or applied scientific research;

(2) when the head of the agency decides the vesting furthers the objectives of the agency;

(3) without further obligation to the United States Government; and

(4) under conditions the head of the agency considers appropriate.

(Pub. L. 97–258, Sept. 13, 1982, 96 Stat. 1004.)

§ 6307. Interpretative guidelines and exemptions

The Director of the Office of Management and Budget may—

(1) issue supplementary interpretative guidelines to promote consistent and efficient use of procurement contracts, grant agreements, and cooperative agreements; and

(2) exempt a transaction or program of an executive agency from this chapter.

(Pub. L. 97–258, Sept. 13, 1982, 96 Stat. 1005.)

§ 6308. Use of multiple relationships for different parts of jointly financed projects

This chapter does not require an executive agency to establish only one relationship between the United States Government and a State, a local government, or other recipient on a jointly financed project involving amounts from more than one program or appropriation when different relationships would otherwise be appropriate for different parts of the project.

(Pub. L. 97–258, Sept. 13, 1982, 96 Stat. 1005.)

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CHAPTER 65—INTERGOVERNMENTAL COOPERATION

§ 6501. Definitions

In this chapter—

(1) "assistance" means the transfer of anything of value for a public purpose of support or stimulation that is—

(A) authorized by a law of the United States;

(B) provided by the United States Government through grant or contractual arrangements (including technical assistance programs providing assistance by loan, loan guarantee, or insurance); and

(C) not an annual payment by the United States Government to the District of Columbia government under section 502 of the District of Columbia Self-Government and Governmental Reorganization Act (Public Law 93–198, 87 Stat. 813, D.C. Code, § 47–3406).

(2) "comprehensive planning" includes, to the extent directly related to area needs or needs of a unit of general local government—

(A) preparation, as a guide for governmental policies and action, of general plans on—

(i) the pattern and intensity of land use;

(ii) providing public facilities (including transportation facilities) and other governmental services; and

(iii) the effective development and use of human and natural resources;

(B) long-range physical and fiscal plans for an action referred to in subclause (A) of this clause (2);

(C) a program for capital improvements and other major expenditures based on their relative urgency, and definitive financing plans for the expenditures in the earlier years of the program;

(D) coordination of related plans and activities of States and local governments and agencies concerned; and

(E) preparation of regulatory and administrative measures to support the items referred to in subclauses (A)–(D) of this clause (2).

(3) "executive agency" does not include a mixed-ownership Government corporation.

(4)(A) "grant" (except as provided in subclause (C) of this clause (4)) means money, or property provided instead of money, that is paid or provided by the United States Government under a fixed annual or total authorization, to a State, to a local government, or to a beneficiary under a plan or program administered by a State or a local government that is subject to approval by an executive agency, if the authorization—

(i) requires the State or local government to expend non-Government money as a condition of receiving money or property from the United States Government; or

(ii) specifies directly, or establishes by means of a formula, the amount that may be provided to the State or local government, or the amount to be allotted for use in each State by the State, local government, and beneficiaries.

(B) "grant" (except as provided in subclause (C) of this clause (4)) also means money, or property provided instead of money, that is paid or provided by the United States Government to a private, nonprofit community organization eligible to receive amounts under the Community Services Block Grant Act (42 U.S.C. 9901 et seq.).

(C) "grant" does not include—

(i) shared revenue;

(ii) payment of taxes;

(iii) payment instead of taxes;

(iv) a loan or repayable advance;

(v) surplus property or surplus agricultural commodities provided as surplus property;

(vi) a payment under a research and development procurement contract or grant awarded directly and on similar terms to all qualifying organizations; or

(vii) a payment to a State or local government as complete reimbursement for costs incurred in paying benefits or providing services to persons entitled to them under a law of the United States.

(5) "head of a State agency" includes the designated delegate of the head of the agency.

(6) "local government" means a unit of general local government, a school district, or other special district established under State law.

(7) "special-purpose unit of local government" means a special district, public-purpose local government of a State except a school district.

(8) "State" means a State of the United States, the District of Columbia, a territory or possession of the United States, and an agency or instrumentality of a State but does not mean a local government of a State.

(9) "unit of general local government" means a county, city, town, village, or other general purpose political subdivision of a State.

(Pub. L. 97–258, Sept. 13, 1982, 96 Stat. 1005; Pub. L. 97–452, § 1(24), Jan. 12, 1983, 96 Stat. 2478.)

§ 6502. Information on grants received

On request of a chief executive officer of a State, a State legislature, or an official designated by either of them, an executive agency carrying out a grant program to States and local governments shall provide the requesting officer or legislature with written information on the purpose and amounts of grants provided to the State or local government.

(Pub. L. 97–258, Sept. 13, 1982, 96 Stat. 1007.)

§ 6503. Transfer and deposit requirements

(a) Consistent with program purposes and regulations of the Secretary of the Treasury, the head of an executive agency carrying out a grant program shall schedule the transfer of grant money to minimize the time elapsing between transfer of the money from the Treasury and the disbursement by a State, whether disbursement occurs before or after the transfer. A State is not accountable for interest earned on grant money pending its disbursement for program purposes.

(b) A State may not be required by a law or regulation of the United States to deposit grant money received by it in a separate bank account. However, a State shall account for grant money made available to the State as United States Government grant money in the accounts of the State.

The head of the State agency concerned shall make periodic authenticated reports to the head of the appropriate executive agency on the status and the application of the money, the liabilities and obligations on hand, and other information required by the head of the executive agency. Records related to the grant received by the State shall be made available to the head of the executive agency and the Comptroller General for auditing.
(Pub. L. 97-258, Sept. 13, 1982, 96 Stat. 1007.)

§ 6504. Use of existing State or multimember agency to administer grant programs

Notwithstanding a law of the United States providing that one State agency or multimember agency must be established or designated to carry out or supervise the administration of a grant program, the head of the executive agency carrying out the program may, when requested by the executive or legislative authority of the State responsible for the organizational structure of a State government—

(1) waive the one State agency or multimember agency provision on an adequate showing that the provision prevents the establishment of the most effective and efficient organizational arrangement within the State government; and

(2) approve another State administrative structure or arrangement after deciding that the objectives of the law authorizing the grant program will not be endangered by using another State structure or arrangement.

(Pub. L. 97-258, Sept. 13, 1982, 96 Stat. 1007.)

§ 6505. Authority to provide specialized or technical services

(a) The President may prescribe statistical and other studies and compilations, development projects, technical tests and evaluations, technical information, training activities, surveys, reports, documents, and other similar services that an executive agency is especially competent and authorized by law to provide. The services prescribed must be consistent with and further the policy of the United States Government of relying on the private enterprise system to provide services reasonably and quickly available through ordinary business channels.

(b) The head of an executive agency may provide services prescribed by the President under this section to a State or local government when—

(1) written request is made by the State or local government; and

(2) payment of pay and all other identifiable costs of providing the services is made to the executive agency by the State or local government making the request.

(c) Payment received by an executive agency for providing services under this section shall be deposited to the credit of the principal appropriation from which the cost of providing the services has been paid or will be charged.

(d) The authority under this section is in addition to authority under another law in effect on October 16, 1968.

(Pub. L. 97-258, Sept. 13, 1982, 96 Stat. 1007.)

§ 6506. Development assistance

(a) The economic and social development of the United States and the achievement of satisfactory levels of living depend on the sound and orderly development of urban and rural areas. When urbanization proceeds rapidly, the sound and orderly development of urban communities depends to a large degree on the social and economic health and the sound development of smaller communities and rural areas.

(b) The President shall prescribe regulations governing the formulation, evaluation, and review of United States Government programs and projects having a significant impact on area and community development (including programs and projects providing assistance to States and localities) to serve most effectively the basic objectives of subsection (a) of this section. The regulations shall provide for the consideration of concurrently achieving the following specific objectives and, to the extent authorized by law, reasoned choices shall be made between the objectives when they conflict:

(1) appropriate land uses for housing, commercial, industrial, governmental, institutional, and other purposes.

(2) wise development and conservation of all natural resources.

(3) balanced transportation systems, including highway, air, water, pedestrian, mass transit, and other means to move people and goods.

(4) adequate outdoor recreation and open space.

(5) protection of areas of unique natural beauty and historic and scientific interest.

(6) properly planned community facilities (including utilities for supplying power, water, and communications) for safely disposing of wastes, and for other purposes.

(7) concern for high standards of design.

(c) To the extent possible, all national, regional, State, and local viewpoints shall be considered in planning development programs and projects of the United States Government or assisted by the Government. State and local government objectives and the objectives of regional organizations shall be considered within a framework of national public objectives expressed in laws of the United States. Available projections of future conditions in the United States and needs of regions, States, and localities shall be considered in plan formulation, evaluation, and review.

(d) To the maximum extent possible and consistent with national objectives, assistance for development purposes shall be consistent with and further the objectives of State, regional, and local comprehensive planning. Consideration shall be given to all developmental aspects of our total national community, including housing, transportation, economic development, natural and human resources development, community facilities, and the general improvement of living environments.

(e) To the maximum extent practicable, each executive agency carrying out a development assistance program shall consult with and seek advice from all other significantly affected executive agencies in an effort to ensure completely coordinated programs. To the extent possible, systematic planning required by individual United States Government programs (such as highway construction, urban renewal, and open space) shall be coordinated with and, to the extent authorized by law, made part of comprehensive local and areawide development planning.

(f) When a law of the United States provides that both a special-purpose unit of local government and a unit of general local government are eligible to receive a loan or grant, the head of an executive agency shall make the loan or grant to the unit of general local government instead of the special-purpose unit of local government in the absence of substantial reasons to the contrary.

(g) The President may designate an executive agency to prescribe regulations to carry out this section.

(Pub. L. 97-258, Sept. 13, 1982, 96 Stat. 1008.)

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CHAPTER 69—PAYMENT FOR ENTITLEMENT LAND

§ 6901. Definitions

In this chapter—

(1) "entitlement land" means land owned by the United States Government—

* * * * *

(B) the Secretary of the Interior administers through the Bureau of Land Management;

(C) dedicated to the use of the Government for water resource development projects;

* * * * *

(2) "unit of general local government" means:

(A) a county (or parish), township, borough existing in Alaska on October 20, 1976, or city where the city is independent of any other unit of general local government, that: (i) is within the class or classes of such political subdivisions in a State that the Secretary of the Interior, in his discretion, determines to be the principal provider or providers of governmental services within the State; and (ii) is a unit of general government as determined by the Secretary of the Interior on the basis of the same principles as were used on January 1, 1983, by the Secretary of Commerce for general statistical purposes. The term "governmental services" includes, but is not limited to, those services that relate to public safety, environment, housing, social services, transportation, and governmental administration;

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(Pub. L. 97–258, Sept. 13, 1982, 96 Stat. 1031; Pub. L. 98–63, title I, § 101(1), July 30, 1983, 97 Stat. 323.)

EXPLANATORY NOTE

Popular Name. Sections 6901–6906 of title 31 are derived from the Act of October 20, 1976, Public Law 94–565, 90 Stat. 2662, which is popularly known as the Payment in Lieu of Taxes Act (PILTA).

§ 6902. Authority and eligibility

(a) The Secretary of the Interior shall make a payment for each fiscal year to each unit of general local government in which entitlement land is located. A unit may use the payment for any governmental purpose.

(b) A unit of general local government may not receive a payment for land for which payment under this chapter otherwise may be received if the land was owned or administered by a State or unit and was exempt from real estate taxes when the land was conveyed to the United States Government. This subsection does not apply to payments for land a State or unit acquires from a private party to donate to the Government within 8 years of acquisition.

(c) A unit of general local government receiving payment for a fiscal year for land under the Act of August 28, 1937 (43 U.S.C. 1181a et seq.), or the Act of May 24, 1939 (ch. 144, 53 Stat. 753), may not receive a payment under this chapter for the land for that fiscal year. This chapter does not apply to either Act.

(d) If the total payment to a unit of general local government for a fiscal year would be less than $100, the Secretary may not make the payment.

(Pub. L. 97–258, Sept. 13, 1982, 96 Stat. 1032.)

EXPLANATORY NOTE

References in the Text. The Acts of August 28, 1937 and May 24, 1939, referred to in subsection (c) provide for the disposition of funds derived from the revested Oregon and California Railroad and reconveyed Coos Bay Wagon Road grant lands in Oregon. Neither Act appears herein.

§ 6903. Payments

(a) In this section—

(1) "payment law" means—

(A) the Act of June 20, 1910 (ch. 310, 36 Stat. 557);

(B) section 33 of the Bankhead-Jones Farm Tenant Act (7 U.S.C. 1012);

(C) the Act of May 23, 1908 (16 U.S.C. 500);

(D) section 5 of the Act of June 22, 1948 (16 U.S.C. 577g, 577g–1);

(E) section 401(c)(2) of the Act of June 15, 1935 (16 U.S.C. 715s(c)(2));

(F) section 17 of the Federal Power Act (16 U.S.C. 810);

(G) section 35 of the Act of February 25, 1920 (30 U.S.C. 191);

(H) section 6 of the Mineral Leasing Act for Acquired Lands (30 U.S.C. 355);

(I) section 3 of the Act of July 31, 1947 (30 U.S.C. 603); and

(J) section 10 of the Act of June 28, 1934 (known as the Taylor Grazing Act) (43 U.S.C. 315i).

(2) population shall be determined on the same basis that the Secretary of Commerce determines resident population for general statistical purposes.

(3) a unit of general local government may not be credited with a population of more than 50,000.

(b)(1) A payment under section 6902 of this title is equal to the greater of—

(A) 75 cents for each acre of entitlement land located within a unit of general local government (but not more than the limitation determined under subsection (c) of this section) reduced (but not below 0) by amounts the unit received in the prior fiscal year under a payment law; or

(B) 10 cents for each acre of entitlement land located in the unit (but not more than the limitation determined under subsection (c) of this section).

(2) The chief executive officer of a State shall submit to the Secretary of the Interior a statement on the amounts of payments the State transfers to each unit of general local government in the State out of amounts received under a payment law.

(c)(1) The limitation for a unit of general local government with a population of not more than 4,999 is $50 times the population.

(2) The limitation for a unit of general local government with a population of at least 5,000 is the following amount (rounding the population off to the nearest thousand):

If population equals—	the limitation is equal to the population times—
5,000	$50.00
6,000	47.00
7,000	44.00
8,000	41.00
9,000	38.00
10,000	35.00
11,000	34.00
12,000	33.00
13,000	32.00
14,000	31.00
15,000	30.00
16,000	29.50
17,000	29.00
18,000	28.50
19,000	28.00
20,000	27.50
21,000	27.20
22,000	26.90
23,000	26.60

24,000	26.30
25,000	26.00
26,000	25.80
27,000	25.60
28,000	25.40
29,000	25.20
30,000	25.00
31,000	24.75
32,000	24.50
33,000	24.25
34,000	24.00
35,000	23.75
36,000	23.50
37,000	23.25
38,000	23.00
39,000	22.75
40,000	22.50
41,000	22.25
42,000	22.00
43,000	21.75
44,000	21.50
45,000	21.25
46,000	21.00
47,000	20.75
48,000	20.50
49,000	20.25
50,000	20.00

(Pub. L. 97–258, Sept. 13, 1982, 96 Stat. 1032; Pub. L. 98–63, title I, § 101(2), July 30, 1983, 97 Stat. 324.)

EXPLANATORY NOTE

References in the Text. The "payment laws" referenced in subsection (a) provide for payments from proceeds from or for (A) public lands in Arizona and New Mexico, (B) Bankhead-Jones Farm Tenant Act lands, (C) national forests, (D) national forest lands in northern Minnesota, (E) the National Wildlife Refuge System, (F) Federal hydroelectric power licenses, (G) and (H) mineral leases, (I) mineral and vegetative materials, and (J) Taylor Grazing Act lands.

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§ 6906. Authorization of appropriations

Necessary amounts may be appropriated to the Secretary of the Interior to carry out this chapter. Amounts are available only as provided in appropriation laws.

(Pub. L. 97–258, Sept. 13, 1982, 96 Stat. 1035.)

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SUBTITLE VI—MISCELLANEOUS

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CHAPTER 97—MISCELLANEOUS

§ 9701. Fees and charges for Government services and things of value

(a) It is the sense of Congress that each service or thing of value provided by an agency (except a mixed-ownership Government corporation) to a person (except a person on official business of the United States Government) is to be self-sustaining to the extent possible.

(b) The head of each agency (except a mixed-ownership Government corporation) may prescribe regulations establishing the charge for a service or thing of value provided by the agency. Regulations prescribed by the heads of executive agencies are subject to policies prescribed by the President and shall be as uniform as practicable. Each charge shall be—

(1) fair; and

(2) based on—

(A) the costs to the Government;

(B) the value of the service or thing to the recipient;

(C) public policy or interest served; and

(D) other relevant facts.

(c) This section does not affect a law of the United States—

(1) prohibiting the determination and collection of charges and the disposition of those charges; and

(2) prescribing bases for determining charges, but a charge may be redetermined under this section consistent with the prescribed bases.

(Pub. L. 97–258, Sept. 13, 1982, 96 Stat. 1051.)

§ 9702. Investment of trust funds

Except as required by a treaty of the United States, amounts held in trust by the United States Government (including annual interest earned on the amounts)—

(1) shall be invested in Government obligations; and

(2) shall earn interest at an annual rate of at least 5 percent.

(Pub. L. 97–258, Sept. 13, 1982, 96 Stat. 1052.)

TITLE 33, U.S. CODE—NAVIGATION AND NAVIGABLE WATERS

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CHAPTER 15—FLOOD CONTROL

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§ 702c. Same; expenditures for construction work; conditions precedent; liability for damage from flood waters; condemnation proceedings, floodage rights.

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No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place:

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(May 15, 1928, ch. 569, § 3, 45 Stat. 535.)

TITLE 40, U.S. CODE—PUBLIC BUILDINGS, PROPERTY, AND WORKS

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CHAPTER 3—PUBLIC BUILDINGS AND WORKS GENERALLY

* * * * *

§ 255. Approval of title prior to Federal land purchases; payment of title expenses; application to Tennessee Valley Authority; Federal jurisdiction over acquisitions

Unless the Attorney General gives prior written approval of the sufficiency of the title to land for the purpose for which the property is being acquired by the United States, public money may not be expended for the purchase of the land or any interest therein.

The Attorney General may delegate his responsibility under this section to other departments and agencies, subject to his general supervision and in accordance with regulations promulgated by him.

Any Federal department or agency which has been delegated the responsibility to approve land titles under this section may request the Attorney General to render his opinion as to the validity of the title to any real property or interest therein, or may request the advice or assistance of the Attorney General in connection with determinations as to the sufficiency of titles.

Except where otherwise authorized by law or provided by contract, the expenses of procuring certificates of titles or other evidences of title as the Attorney General may require may be paid out of the appropriations for the acquisition of land or out of the appropriations made for the contingencies of the acquiring department or agency.

The foregoing provisions of this section shall not be construed to affect in any manner any existing provisions of law which are applicable to the acquisition of lands or interests in land by the Tennessee Valley Authority.

Notwithstanding any other provision of law, the obtaining of exclusive jurisdiction in the United States over lands or interests therein which have been or shall hereafter be acquired by it shall not be required; but the head or other authorized officer of any department or independent establishment or agency of the Government may, in such cases and at such times as he may deem desirable, accept or secure from the State in which any lands or interests therein under his immediate jurisdiction, custody, or control are situated, consent to or cession of such jurisdiction, exclusive or partial, not theretofore obtained, over any such lands or interests as he may deem desirable and indicate acceptance of such jurisdiction on behalf of the

United States by filing a notice of such acceptance with the Governor of such State or in such other manner as may be prescribed by the laws of the State where such lands are situated. Unless and until the United States has accepted jurisdiction over lands hereafter to be acquired as aforesaid, it shall be conclusively presumed that no such jurisdiction has been accepted.
(R.S. § 355; June 28, 1930, ch. 710, 46 Stat. 828; Feb. 1, 1940, ch. 18, 54 Stat. 19; Oct. 9, 1940, ch. 793, 54 Stat. 1083; Sept. 1, 1970, Pub. L. 91-393, § 1, 84 Stat. 835.)

§ 257. Condemnation of realty for sites and other uses

In every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses, he may acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, and the Attorney General of the United States, upon every application of the Secretary of the Treasury, under this section and section 258 of this title, or such other officer, shall cause proceedings to be commenced for condemnation within thirty days from receipt of the application at the Department of Justice.
(Aug. 1, 1888, ch. 728, § 1, 25 Stat. 357; June 25, 1948, ch. 646, § 6, 62 Stat. 936.)

§ 258a. Lands, easements, or rights of way for public use; taking of possession and title in advance of final judgment; authority; procedure

In any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. Said declaration of taking shall contain or have annexed thereto—

(1) A statement of the authority under which and the public use for which said lands are taken.

(2) A description of the lands taken sufficient for the identification thereof.

(3) A statement of the estate or interest in said lands taken for said public use.

(4) A plan showing the lands taken.

(5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable.

(Feb. 26, 1931, ch. 307, § 1, 46 Stat. 1421.)

§ 258b. Taking in advance of final judgment; appeal or giving of bond as preventing or delaying vesting of title

No appeal in any cause under section 258 of this title nor any bond or undertaking given therein shall operate to prevent or delay the vesting of title to such lands in the United States.

(Feb. 26, 1931, ch. 307, § 2, 46 Stat. 1422.)

§ 258c. Obligation of United States to pay ultimate award when fixed

Action under section 258a of this title irrevocably committing the United States to the payment of the ultimate award shall not be taken unless the chief of the executive department or agency or bureau of the government empowered to acquire the land shall be of the opinion that the ultimate award probably will be within any limits prescribed by Congress on the price to be paid.

(Feb. 26, 1931, ch. 307, § 3, 46 Stat. 1422.)

§ 258d. Taking in advance of final judgment; right as additional to existing rights, powers, and authority

The right to take possession and title in advance of final judgment in condemnation proceedings as provided by section 258a of this title shall be

in addition to any right, power, or authority conferred by the laws of the United States or those of any State or Territory under which such proceedings may be conducted, and shall not be construed as abrogating, limiting, or modifying any such right, power, or authority.
(Feb. 26, 1931, ch. 307, § 4, 46 Stat. 1422.)

§ 258e. Taking in advance of final judgment; demolition of buildings thereon; erection of public buildings or works; funds available for purpose

In any case in which the United States has taken or may take possession of any real property during the course of condemnation proceedings and in advance of final judgment therein and the United States has become irrevocably committed to pay the amount ultimately to be awarded as compensation, it shall be lawful to expend moneys duly appropriated for that purpose in demolishing existing structures on said land and in erecting public buildings or public works thereon: *Provided*, That in the opinion of the Attorney General, the title has been vested in the United States or all persons having an interest therein have been made parties to such proceeding and will be bound by the final judgment therein.
(Feb. 26, 1931, ch. 307, § 5, 46 Stat. 1422; Sept. 1, 1970, Pub. L. 91-393, § 4, 84 Stat. 835.)

§ 258f. Exclusion of certain property by stipulation of Attorney General

In any condemnation proceeding instituted by or on behalf of the United States, the Attorney General is authorized to stipulate or agree in behalf of the United States to exclude any property or any part thereof, or any interest therein, that may have been, or may be, taken by or on behalf of the United States by declaration of taking or otherwise.
(Oct. 21, 1942, ch. 618, 56 Stat. 797.)

* * * * *

§ 270a. Bonds of contractors of public buildings or works

(a) Type of bonds required

Before any contract, exceeding $25,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor":

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the

contract shall be not more than $1,000,000 the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $1,000,000 and not more than $5,000,000, the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $5,000,000 the said payment bond shall be in the sum of $2,500,000.

(b) Waiver of bonds for contracts performed in foreign countries

The contracting officer in respect of any contract is authorized to waive the requirement of a performance bond and payment bond for so much of the work under such contract as is to be performed in a foreign country if he finds that it is impracticable for the contractor to furnish such bonds.

(c) Authority to require additional bonds

Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases specified in subsection (a) of this section.

(d) Coverage for taxes in performance bond

Every performance bond required under this section shall specifically provide coverage for taxes imposed by the United States which are collected, deducted, or withheld from wages paid by the contractor in carrying out the contract with respect to which such bond is furnished. However, the United States shall give the surety or sureties on such bond written notice, with respect to any such unpaid taxes attributable to any period, within ninety days after the date when such contractor files a return for such period, except that no such notice shall be given more than one hundred and eighty days from the date when a return for the period was required to be filed under title 26. No suit on such bond for such taxes shall be commenced by the United States unless notice is given as provided in the preceding sentence, and no such suit shall be commenced after the expiration of one year after the day on which such notice is given.

(Aug. 24, 1935, ch. 642, § 1, 49 Stat. 793; Nov. 2, 1966, Pub. L. 89–719, title I, § 105(b), 80 Stat. 1139; Nov. 2, 1978, Pub. L. 95–585, 92 Stat. 2484.)

Explanatory Note

Popular Name. Sections 270a to 270d of title 40 are popularly known as the "Miller Act."

§ 270b. Rights of persons furnishing labor or material

(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under sections 270a to 270d of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelop addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by him. The United States shall not be liable for the payment of any costs or expenses of any such suit.

(Aug. 24, 1935, ch. 642, § 2, 49 Stat. 794; Aug. 4, 1959, Pub. L. 86–135, § 1, 73 stat. 279.)

§ 270c. Right of person furnishing labor or material to copy of bond

The department secretary or agency head of the contracting agency is authorized and directed to furnish, to any person making application therefor who submits an affidavit that he has supplied labor or materials for such work and payment therefor has not been made on that he is being sued on any such bond, a certified copy of such bond and the contract for which it was given, which copy shall be prima facie evidence of the contents, execution, and delivery of the original. Applicants shall pay for such certified copies such fees as the department secretary or agency head of the contracting agency fixes to cover the cost of preparation thereof.

(Aug. 24, 1935, ch. 642, § 3, 49 Stat. 794; Aug. 4, 1959, Pub. L. 86–135, § 2, 73 Stat. 279; Apr. 18, 1984, Pub. L. 98–269, 98 Stat. 156.)

§ 270d. "Person" defined

The term "person" and the masculine pronoun as used in sections 270a to 270d of this title shall include all persons whether individuals, associations, copartnerships, or corporations.

(Aug. 24, 1935, ch. 642, § 4, 49 Stat. 794.)

* * * * *

276a. Rate of wages for laborers and mechanics

(a) The advertised specifications for every contract in excess of $2,000, to which the United States or the District of Columbia is a party, for construction, alteration, and/or repair, including painting and decorating, of public buildings or public works of the United States or the District of Columbia within the geographical limits of the States of the Union, or the District of Columbia, and which requires or involves the employment of mechanics and/or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the State, in which the work is to be performed, or in the District of Columbia if the work is to be performed there; and every contract based upon these specifications shall contain a stipulation that the contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less than those stated in the advertised specifications, regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics, and that the scale of wages to be paid shall be posted by the contractor in a prominent and easily accessible place at the site of the work; and the further stipulation that there may be withheld from the contractor so much of accrued payments as may be considered necessary by the contracting officer to pay to laborers and mechanics employed by the contractor or any subcontractor on the work the difference between the rates of wages required by the contract to be paid laborers and mechanics on the work and the rates of wages received by such laborers and mechanics and not refunded to the contractor, subcontractors, or their agents.

(b) As used in sections 276a to 276a–5 of this title the term "wages", "scale of wages", "wage rates", "minimum wages", and "prevailing wages" shall include—

(1) the basic hourly rate of pay; and

(2) the amount of—

(A) the rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a fund, plan, or program; and

(B) the rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing benefits to laborers and mechanics pursuant to an enforcible commitment to carry out a financially responsible plan or program which was communicated in writing to the laborers and mechanics affected,

for medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, for unemployment benefits, life insurance, disability and sickness insurance, or accident insurance, for vacation and holiday pay, for defraying costs of apprenticeship or other similar programs, or for other bona fide fringe benefits, but only where the contractor or subcontractor is not required by other Federal, State, or local law to provide any of such benefits:

Provided, That the obligation of a contractor or subcontractor to make payment in accordance with the prevailing wage determinations of the Secretary of Labor, insofar as sections 276a to 276a–5 of this title and other Acts incorporating sections 276a to 276a-5 of this title by reference are concerned may be discharged by the making of payments in cash, by the making of contributions of a type referred to in paragraph (2)(A), or by the assumption of an enforcible commitment to bear the costs of a plan or program of a type referred to in paragraph (2)(B), or any combination thereof, where the aggregate of any such payments, contributions, and costs is not less than the rate of pay described in paragraph (1) plus the amount referred to in paragraph (2).

In determining the overtime pay to which the laborer or mechanic is entitled under any Federal law, his regular or basic hourly rate of pay (or other alternative rate upon which premium rate of overtime compensation is computed) shall be deemed to be the rate computed under paragraph (1), except that where the amount of payments, contributions, or costs incurred with respect to him exceeds the prevailing wage applicable to him under sections 276a to 276a–5 of this title, such regular or basic hourly rate of pay (or such other alternative rate) shall be arrived at by deducting from the amount of payments, contributions, or costs actually incurred with respect to him, the amount of contributions or costs of the types described in paragraph (2) actually incurred with respect to him, or the amount determined under paragraph (2) but not actually paid, whichever amount is the greater.

(Mar. 3, 1931, ch. 411, § 1, 46 Stat. 1494; Aug. 30, 1935, ch. 825, 49 Stat. 1011; June 15, 1940, ch. 373, § 1, 54 Stat. 399; July 12, 1960, Pub. L. 86–624, § 26, 74 Stat. 418; July 2, 1964, Pub. L. 88–349, § 1, 78 Stat. 238.)

EXPLANATORY NOTE

Popular Name. Sections 276a to 276a–5 of title 40 are popularly known as the "Davis-Bacon Act."

§ 276a–1. Termination of work on failure to pay agreed wages; completion of work by Government

Every contract within the scope of sections 276a to 276a–5 of this title shall contain the further provision that in the event it is found by the contracting officer that any laborer or mechanic employed by the contractor

or any subcontractor directly on the site of the work covered by the contract has been or is being paid a rate of wages less than the rate of wages required by the contract to be paid as aforesaid, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been a failure to pay said required wages and to prosecute the work to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess costs occasioned the Government thereby.
(Mar. 3, 1931, ch. 411, § 2, as added Aug. 30, 1935, ch. 825, 49 Stat. 1011.)

§ 276a–2. Payment of wages by Comptroller General from withheld payments; listing contractors violating contracts

(a) The Comptroller General of the United States is authorized and directed to pay directly to laborers and mechanics from any accrued payments withheld under the terms of the contract any wages found to be due laborers and mechanics pursuant to sections 276a to 276a–5 of this title; and the Comptroller General of the United States further authorized and is directed to distribute a list to all departments of the Government giving the names of persons or firms whom he has found to have disregarded their obligations to employees and subcontractors. No contract shall be awarded to the persons or firms appearing on this list or to any firm, corporation, partnership, or association in which such persons or firms have an interest until three years have elapsed from the date of publication of the list containing the names of such persons or firms.

(b) If the accrued payments withheld under the terms of the contract, as aforesaid are insufficient to reimburse all the laborers and mechanics, with respect to whom there has been a failure to pay the wages required pursuant to sections 276a to 276a–5 of this title, such laborers and mechanics shall have the right of action and/or of intervention against the contractor and his sureties conferred by law upon persons furnishing labor or materials, and in such proceedings it shall be no defense that such laborers and mechanics accepted or agreed to accept less than the required rate of wages or voluntarily made refunds.
(Mar. 3, 1931, ch. 411, § 3, as added Aug. 30, 1935, ch. 825, 49 Stat. 1011.)

§ 276a–3. Effect on other Federal laws

Sections 276a to 276a–5 of this title shall not be construed to supersede or impair any authority otherwise granted by Federal law to provide for the establishment of specific wage rates.
(Mar. 3, 1931, ch. 411, § 4, as added Aug. 30, 1935, ch. 825, 49 Stat. 1011.)

§ 276a–4. Effective date of sections 276a to 276a–5

Sections 276a to 276a–5 of this title shall take effect thirty days after August 30, 1935, but shall not affect any contract then existing or any

contract that may thereafter be entered into pursuant to invitations for bids that are outstanding on August 30, 1935.
(Mar. 3, 1931, ch. 411, § 5, as added Aug. 30, 1935, ch. 825, 49 Stat. 1011.)

§ 276a–5. Suspension of sections 276a to 276a–5 during emergency

In the event of a national emergency the President is authorized to suspend the provisions of sections 276a to 276a–5 of this title.
(Mar. 3, 1931, ch. 411, § 6, as added Aug. 30, 1935, ch. 825, 49 Stat. 1011.)

§ 276a–7. Application of sections 276a to 276a–5 to contracts entered into without regard to section 5 of title 41

The fact that any contract authorized by any Act is entered into without regard to section 5 of title 41, or upon a cost-plus-a-fixed-fee basis or otherwise without advertising for proposals, shall not be construed to render inapplicable the provisions of sections 276a to 276a–5 of this title, if such Act would otherwise be applicable to such contract.
(Mar. 23, 1941, ch. 26, 55 Stat. 53; Aug. 21, 1941, ch. 395, 55 Stat. 658.)

§ 276c. Regulations governing contractors and subcontractors

The Secretary of Labor shall make reasonable regulations for contractors and subcontractors engaged in the construction, prosecution, completion or repair of public buildings, public works or buildings or works financed in whole or in part by loans or grants from the United States, including a provision that each contractor and subcontractor shall furnish weekly a statement with respect to the wages paid each employee during the preceding week. Section 1001 of title 18 shall apply to such statements.
(June 13, 1934, ch. 482, § 2, 48 Stat. 948; May 24, 1949, ch. 139, § 134, 63 Stat. 108; Aug. 28, 1958, Pub. L. 85–800, § 12, 72 Stat. 967.)

EXPLANATORY NOTE

Popular Name. Section 276c derives from section 2 of the Act of June 13, 1934, which is popularly known as the Copeland Act or the Anti-Kickback Act.

§ 278a. Lease of buildings to Government; maximum rental

On and after June 30, 1932, no appropriation shall be obligated or expended for the rent of any building or part of a building to be occupied for Government purposes at a rental in excess of the per annum rate of 15 per centum of the fair market value of the rented premises at date of the lease under which the premises are to be occupied by the Government nor for alterations, improvements, and repairs of the rented premises in excess of 25 per centum of the amount of the rent for the first year of the rental term, or for the rental term if less than one year: *Provided*, That the provisions of this section shall not apply to leases made prior to June 30, 1932, except when renewals thereof are made after such date, nor to leases of premises in foreign countries for the foreign services of the United States:

Provided, further, That the provisions of this section as applicable to rentals, shall apply only where the rental to be paid shall exceed $2,000 per annum. (June 30, 1932, ch. 314, § 322, 47 Stat. 412; Mar. 3, 1933, ch. 212, title II, § 15, 47 Stat. 1517.)

§ 278b. Exception of certain vital leases during war or emergency

The provisions of section 278a of this title shall not apply during war or a national emergency declared by Congress or by the President to such leases or renewals of existing leases of privately or publicly owned property as are certified by the Secretary of the Army or the Secretary of the Navy, or by such person or persons as he may designate, as covering premises for military, naval, or civilian purposes necessary for the prosecution of the war or vital in the national emergency.
(Apr. 28, 1942, ch. 249, 56 Stat. 247.)

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CHAPTER 4—THE PUBLIC PROPERTY

* * * * *

§ 303b. Lease of buildings by Government; money consideration

On and after June 30, 1932, except as otherwise specifically provided by law, the leasing of buildings and properties of the United States shall be for a money consideration only, and there shall not be included in the lease any provision for the alteration, repair, or improvement of such buildings or properties as a part of the consideration for the rental to be paid for the use and occupation of the same. The moneys derived from such rentals shall be deposited and covered into the Treasury as miscellaneous receipts. (June 30, 1932, ch. 314, § 321, 47 Stat. 412.)

* * * * *

§ 304a. Disposition of surplus real property; assignment to governmental agency; lease; sale

Notwithstanding any other provisions of law, whenever any real property located outside of the District of Columbia, exclusive of military or naval reservations, heretofore or hereafter acquired by an Federal agency, by judicial process or otherwise in the collection of debts, purchase, donation, condemnation, devise, forfeiture, lease, or in any other manner, is, in whole or in part, declared to be in excess of its needs by the Federal agency having control thereof, or by the President on recommendation of the Administrator of General Services, the Administrator of General Services is authorized (a) to assign or reassign to any Federal agency or agencies space therein: *Provided*, That if the Federal agency to which space is assigned does not desire to occupy the space so assigned to it, the decision of the Administrator of General Services shall be subject to review by the President;

or (b) pending a sale, to lease such real property on such terms and for such period not in excess of five years as he may deem in the public interest; or (c) to sell the same at public sale to the highest responsible bidder upon such terms and after such public advertisement as he may deem in the public interest: *Provided, further,* That if no bids which are satisfactory as to price and responsibility of bidder are received as a result of such public advertisement, the Administrator of General Services is authorized to sell such property by negotiation, upon such terms as may be deemed to be to the best interest of the Government, but at a price not less than that bid by the highest responsible bidder.
(Aug. 27, 1935, ch. 744, § 1, 49 Stat. 885: July 18, 1940, ch. 635, §§ 1, 3, 54 Stat. 764, 765; June 30, 1949, ch. 288, title I, § 103(a), 63 Stat. 380.)

§ 304a–1. Expenses of sale; maintenance

There are authorized to be appropriated such amounts as may be necessary to cover the costs incident to the sale or lease of real property, or demolition of buildings thereon as hereinafter authorized, which have been or may hereafter be declared surplus to the needs of any Federal agency in accordance with the provisions of sections 304a to 304e of this title, and the care, maintenance, and protection thereof, including, but not limited to pay of employees, travel of Government employees, brokers' fees not in excess of rates paid for similar services in the community where the property is situated, appraisals, photographs, surveys, evidence of title and perfecting of defective titles, advertising, and telephone and telegraph charges: *Provided, however,* That a Federal agency shall remain responsible for the proper care, maintenance, and protection of the aforesaid property, notwithstanding any declaration that the same is in excess of its needs until such time as custody is assumed by the Administrator of General Services or other disposition is made thereof.
(Aug. 27, 1935, ch. 744, § 6, as added July 18, 1940, ch. 635, § 2, 54 Stat. 764, and amended June 30, 1949, ch. 288, title I, § 103(a), 63 Stat. 380.)

CHAPTER 5—HOURS OF LABOR AND SAFETY ON PUBLIC WORKS

SUBCHAPTER II—CONTRACT WORK HOURS AND SAFETY STANDARDS

§ 327. "Secretary" defined

As used herein, the term "Secretary" means the Secretary of Labor, United States Department of Labor.
(Pub. L. 87–581, title I, § 101, Aug. 13, 1962, 76 Stat. 357.)

EXPLANATORY NOTE

Short Title. Section 1 of the Act of August 13, 1962, Public Law 87–581, 76 Stat. 357, as amended by section 2 of the Act of August 9, 1969, Public Law 91–54, 83 Stat. 98, provided that sections 327 to 333 of title 40 may be cited as the "Contract Work Hours and Safety Standards Act."

§ 328. Eight hour day and forty hour week; overtime compensation; contractual conditions; liability of employers for violation; witholding funds to satisfy liabilities of employers

(a) Notwithstanding any other provision of law, the wages of every laborer and mechanic employed by any contractor or subcontractor in his performance of work on any contract of the character specified in section 329 of this title shall be computed on the basis of a standard workweek of forty hours, and work in excess of such standard workweek shall be permitted subject to provisions of this section. For each workweek in which any such laborer or mechanic is so employed such wages shall include compensation, at a rate not less than one and one-half times the basic rate of pay, for all hours worked in excess of forty hours in the workweek.

(b) The following provisions shall be a condition of every contract of the character specified in section 329 of this title and of any obligation of the United States, any territory, or the District of Columbia in connection therewith:

(1) No contractor or subcontractor contracting for any part of the contract work which may require or involve the employment of laborers or mechanics shall require or permit any laborer or mechanic, in any workweek in which he is employed on such work, to work in excess of forty hours in such workweek except in accordance with the provisions of this subchapter; and

(2) In the event of violation of the provisions of paragraph (1), the contractor and any subcontractor responsible therefor shall be liable to such affected employee for his unpaid wages and shall, in addition, be liable to the United States (or, in the case of work done under contract for the District of Columbia or a territory, to such District or to such territory) for liquidated damages as provided therein. Such liquidated damages shall be computed, with respect to each individual employed as a laborer or mechanic in violation of any provision of this subchapter, in the sum of $10 for each calendar day on which such individual was required or permitted to work in excess of the standard workweek of forty hours without payment of the overtime wages required by this subchapter. The governmental agency for which the contract work is done or by which financial assistance for the work is provided may withhold, or cause to be withheld, subject to the provisions of section 330 of this title, from any moneys payable on account of work performed by a contractor or subcontractor, such sums as may administratively be determined to be necessary to satisfy any liabilities of such contractor or subcontractor for unpaid wages and liquidated damages as herein provided.

(Pub. L. 87–581, title I, § 102, Aug. 13, 1962, 76 Stat. 357; Pub. L. 99–145, title XII, § 1241(a), Nov. 8, 1985, 99 Stat. 734.)

§ 329. Contracts subject to this subchapter; workers covered; exceptions

(a) The provisions of this subchapter shall apply, except as otherwise provided, to any contract which may require or involve the employment of laborers or mechanics upon a public work of the United States, of any territory, or of the District of Columbia, and to any other contract which may require or involve the employment of laborers or mechanics if such contract is one (1) to which the United States or any agency or instrumentality thereof, any territory, or the District of Columbia is a party, or (2) which is made for or on behalf of the United States, any agency or instrumentality thereof, any territory, or the District of Columbia, or (3) which is a contract for work financed in whole or in part by loans or grants from, or loans insured or guaranteed by, the United States or any agency or instrumentality thereof under any statute of the United States providing wage standards for such work: *Provided*, That the provisions of section 328 of this title, shall not apply to work where the assistance from the United States or any agency or instrumentality as set forth above is only in that nature of a loan guarantee, or insurance. Except as otherwise expressly provided, the provisions of this subchapter shall apply to all laborers and mechanics, including watchmen and guards, employed by any contractor or subcontractor in the performance of any part of the work contemplated by any such contract, and for purposes of this subchapter, laborers and mechanics shall include workmen performing services in connection with dredging or rock excavation in any river or harbor of the United States or of any territory or of the District of Columbia, but shall not include any employee employed as a seaman.

(b) This subchapter shall not apply to contracts for transportation by land, air, or water, or for the transmission of intelligence, or for the purchase of supplies or materials or articles ordinarily available in the open market. This subchapter shall not apply with respect to any work required to be done in accordance with the provisions of the Walsh-Healey Public Contracts Act.

(Pub. L. 87–581, title I, § 103, Aug. 13, 1962, 76 Stat. 358.)

EXPLANATORY NOTE

Reference in the Text. The Walsh-Healey Public Contracts Act, referred to in subsection (b), also popularly known as the Walsh-Healey Act, establishes hours and working conditions for employees on manufacturers and suppliers of government contracts. It is classified generally to sections 35–45 of Title 41 of the U.S. Code. Extracts thereof appear in this Appendix.

§ 330. Report of violations and withholding of funds for unpaid wages and liquidated damages

(a) Reports of inspectors; determination of amount of unpaid wages and liquidated damages; authorization for direct payments by Comptroller General

Any officer or person designated as inspector of the work to be performed under any contract of the character specified in section 329 of this title, or to aid in the enforcement or fulfillment thereof shall, upon observation or investigation, forthwith report to the proper officer of the United States, of any territory or possession, or of the District of Columbia, all violations of the provisions of this subchapter occurring in the performance of such work, together with the name of each laborer or mechanic who was required or permitted to work in violation of such provisions and the day or days of such violation. The amount of unpaid wages and liquidated damages owing under the provisions of this subchapter shall be administratively determined and the officer or person whose duty it is to approve the payment of moneys by the United States, the territory, or the District of Columbia in connection with the performance of the contract work shall direct the amount of such liquidated damages to be withheld for the use and benefit of the United States, said territory, or said District, and shall direct the amount of such unpaid wages to be withheld for the use and benefit of the laborers and mechanics who were not compensated as required under the provisions of this subchapter. The Comptroller General of the United States is authorized and directed to pay directly to such laborers and mechanics, from the sums withheld on account of underpayments of wages, the respective amounts administratively determined to be due, if the funds withheld are adequate, and, if not, an equitable proportion of such amounts.

(b) Rights of action and intervention against contractors and sureties

If the accrued paymens withheld under the terms of the contract, as aforesaid, are insufficient to reimburse all the laborers and mechanics with respect to whom there has been a failure to pay the wages required pursuant to this subchapter, such laborers and mechanics shall, in the case of a department or agency of the Federal Government, have the rights of action and/or of intervention against the contractor and his sureties conferred by law upon persons furnishing labor or materials, and in such proceedings it shall be no defense that such laborers and mechanics accepted or agreed to accept less than the required rate of wages or voluntarily made refunds.

(c) Right of contractors to appeal; limitations; administrative determination; review by Secretary and issuance of final decision; filing claim in United States Claims Court

Any contractor or subcontractor aggrieved by the withholding of a sum as liquidated damages as provided in this subchapter shall have the right, within sixty days thereafter, to appeal to the head of the agency of the United States or of the territory for which the contract work is done or by which financial assistance for the work is provided, or to the Mayor of the District of Columbia in the case of liqudated damages withheld for the use and benefit of said District. Such agency head or Mayor, as the case may be, shall have authority to review the administrative determination of liquidated damages and to issue a final order affirming such determination; or, if it is found that the sum determined is incorrect or that the contractor or subcontractor violated the provisions of this subchapter inadvertently notwithstanding the exercise of due care on his part and that of his agents, recommendations may be made to the Secretary that an appropriate adjustment in liquidated damages be made, or that the contractor or subcontractor be relieved of liability for such liquidated damages. The Secretary shall review all pertinent facts in the matter and may conduct such investigations as he deems necessary, so as to affirm or reject the recommendation. The decision of the Secretary shall be final. In all such cases in which a contractor or subcontractor may be aggrieved by a final order for the withholding of liquidated damages as hereinbefore provided, such contractor or subcontractor may, within sixty days after such final order, file a claim in the United States Claims Court: *Provided, however,* That final orders of the agency head, the Mayor of the District of Columbia or the Secretary, as the case may be, shall be conclusive with respect to findings of fact if such findings are supported by substantial evidence.

(d) Applicability of other laws

Reorganization Plan Numbered 14 of 1950 (64 Stat. 1267) shall be applicable with respect to the provisions of this subchapter, and section 276c of this title shall be applicable with respect to those contractors and subcontractors referred to therein who are engaged in the performance of contracts subject to the provisions of this subchapter.

(Pub. L. 87-581, title I, § 104, Aug. 13, 1962, 76 Stat. 358; 1967 Reorg. Plan No. 3, § 401, eff. Nov. 3, 1967, 32 F.R. 11669, 81 Stat. 951; Pub. L. 93-198, title IV, § 421, Dec. 24, 1973, 87 Stat. 789; Pub. L. 97-164, title I, § 160(a)(13), Apr. 2, 1982, 96 Stat. 48.)

EXPLANATORY NOTE

Reference in the Text. Reorganization Plan Numbered 14 of 1950, referred to in subsection (b), directed that the Secretary of Labor establish and enforce labor standards for work performed by other Federal agencies under various statutes. It does not appear herein.

§ 331. Limitations, variations, tolerances, and exemptions

The Secretary may provide such reasonable limitations and may make such rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of this subchapter as he may find necessary and proper in the public interest to prevent injustice or undue hardship or to avoid serious impairment of the conduct of Government business.

(Pub. L. 87-581, title I, § 105, Aug. 13, 1962, 76 Stat. 359.)

§ 332. Violations; penalties

Any contractor or subcontractor whose duty it shall be to employ, direct, or control any laborer or mechanic employed in the performance of any work contemplated by any contract to which this subchapter applies, who shall intentionally violate any provision of this subchapter, shall be deemed guilty of a misdemeanor, and for each and every such offense shall, upon conviction, be punished by a fine of not to exceed $1,000 or by imprisonment for not more than six months, or by both such fine and imprisonment, in the discretion of the court having jurisdiction thereof.

(Pub. L. 87-581, title I, § 106, Aug. 13, 1962, 76 Stat. 359.)

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§ 333. Health and safety standards in building trades and construction industry

(a) Condition of contracts; proceedings for promulgation of regulations; hearing, consultation with Advisory Committee

It shall be a condition of each contract which is entered into under legislation subject to Reorganization Plan Numbered 14 of 1950 (64 Stat. 1267), and is for construction, alteration, and/or repair, including painting and decorating, that no contractor or subcontractor contracting for any part of the contract work shall require any laborer or mechanic employed in the performance of the contract to work in surroundings or under working conditions which are unsanitary, hazardous, or dangerous to his health or safety, as determined under construction safety and health standards promulgated by the Secretary by regulation based on proceedings pursuant to section 553 of title 5, provided that such proceedings include a hearing of the nature authorized by said section. In formulating such standards, the Secretary shall consult with the Advisory Committee created by subsection (e) of this section.

(b) Compliane with section and regulations: inspections, hearings, orders, findings of fact, and decisions; application of sections 38 and 39 of title 41; opportunity for hearing; consequences of noncompliance; cancellation of contracts, completion contracts, additional costs, and withholding of assistance; nonapplication of section 330 of this title

The Secretary is authorized to make such inspections, hold such hearings, issue such orders, and make such decisions based on finding of fact, as are deemed necessary to gain compliance with this section and any health and safety standard promulgated by the Secretary under subsection (a) of this section, and for such purposes the Secretary and the United States district courts shall have the authority and jurisdiction provided by sections 38 and 39 of title 41. In the event that the Secretary of Labor determines noncompliance under the provisions of this section after an opportunity for an adjudicatory hearing by the Secretary of any condition of a contract of a type described in clause (1) or (2) of section 329(a) of this title, the governmental agency for which the contract work is done shall have the right to cancel the contract, and to enter into other contracts for the completion of the contract work, charging any additional cost to the original contractor. In the event of noncompliance, as determined by the Secretary after an opportunity for an adjudicatory hearing by the Secretary, of any condition of a contract of a type described in clause (3) of section 329(a) of this title, the governmental agency by which financial guarantee, assistance, or insurance for the contract work is provided shall have the right to withhold any such assistance attributable to the performance of the contract. Section 330 of this title shall not apply to the enforcement of this section.

(c) Jurisdiction; cause shown; enforcement of compliance

The United States district courts shall have jurisdiction for cause shown, in any actions brought by the Secretary, to enforce compliance with the construction safety and health standard promulgated by the Secretary under subsection (a) of this section.

(d) Finding of ineffective protection against violations; transmission of names of violators to Comptroller General; contract awards prohibition; termination of restriction and notification of Comptroller General and Government agencies; judicial review

(1) If the Secretary determines on the record after an opportunity for an agency hearing that, by repeated willful or grossly negligent violations of this subchapter, a contractor or subcontractor has demonstrated that the provisions of subsections (b) and (c) of this section are not effective to protect the safety and health of his employees, the Secretary shall make a finding to that effect and shall, not sooner than thirty days after giving notice of the findings to all interested persons, transmit the name of such contractor or subcontractor to the Comptroller General.

(2) The Comptroller General shall distribute each name so transmitted to him to all agencies of the Government. Unless the Secretary otherwise recommends, no contract subject to this section shall be awarded to such contractor or subcontractor or to any person in which such contractor or subcontractor has a substantial interest until three years have elapsed from the date the name is transmitted to the Comptroller General. If, before the end of such three-year period, the Secretary, after affording interested persons due notice and opportunity for hearing, is satisfied that a contractor or subcontractor whose name he has transmitted to the Comptroller General will thereafter comply responsibly with the requirements of this section, shall terminate the application of the preceding sentence to such contractor or subcontractor (and to any person in which the contractor or subcontractor has a substantial interest); and when the Comptroller General is informed of the Secretary's action he shall inform all agencies of the Government thereof.

(3) Any person aggrieved by the Secretary's action under subsections (b) or (d) of this section may, within sixty days after receiving notice thereof, file with the appropriate United States court of appeals a petition for review of such action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary, who shall thereupon file in the court the record upon which he based his action, as provided in section 2112 of title 28. The findings of fact by the Secretary, if supported by substantial evidence, shall be final. The court shall have power to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part, the order of the Secretary or the appropriate Government agency. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certifiation as provided in section 1254 of title 28.

(e) Advisory Committee on Construction Safety and Health; establishment; membership; appointment; representation of interests; advice in formulation of standards, regulations, and policy matters; ap-

pointment of experts or consultants; compensation, travel expenses, etc.

(1) The Secretary shall establish in the Department of Labor an Advisory Committee on Construction Safety and Health (hereinafter referred to as the "Advisory Committee") consisting of nine members appointed, without regard to the civil service laws, by the Secretary. The Secretary shall appoint one such member as Chairman. Three members of the Advisory Committee shall be persons representative of contractors to whom this section applies, three members shall be persons representative of employees primarily in the building trades and construction industry engaged in carrying out contracts to which this section applies, and three public representatives who shall be selected on the basis of their professional and technical competence and experience in the construction health and safety field.

(2) The Advisory Committee shall advise the Secretary in the formulation of construction safety and health standards and other regulations, and with respect to policy matters arising in the administration of this section. The Secretary may appoint such special advisory and technical experts or consultants as may be necessary to carry out the functions of the Advisory Committee.

(3) Members of the Advisory Committee shall, while serving on the business of the Advisory Committee, be entitled to receive compensation at rates fixed by the Secretary, but not exceeding $100 per day, including traveltime; and while so serving away from their homes or regular places of business, they may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of title 5 for persons in the Government service employed intermittently.

(f) Safety programs; promotion; prevention of injuries through reports, data, and consultations with employers

The Secretary shall provide for the establishment and supervision of programs for the education and training of employers and employees in the recognition, avoidance, and prevention of unsafe working conditions in employments covered by this subchapter, and to collect such reports and data and to consult with and advise employers as to the best means of preventing injuries.
(Pub. L. 87-581, title I, § 107, as added Pub. L. 91-54, § 1, Aug. 9, 1969, 83 Stat. 96.)

CHAPTER 6—ACQUISITION OF SITES FOR AND CONSTRUCTION OF PUBLIC BUILDINGS

* * * * *

§ 345c. Conveyance or transfer of Federal property to States or political subdivisions

(a) Widening of public highways, streets, or alleys; determination by executive agency head

Whenever a State or political subdivision of a State makes application therefor in connection with an authorized widening of a public highway, street, or alley, the head of the executive agency having control over the affected real property of the United States may convey or otherwise transfer, with or without consideration, to such State or political subdivision for such highway, street, or alley widening purposes, such interest in such real property as he determines will not be adverse to the interests of the United States, subject to such terms and conditions as he deems necessary to protect the interests of the United States.

(b) Executive agency

As used in this section the term "executive agency" means any executive department or independent establishment in the executive branch of the Government of the United States, including any wholly owned Government corporation.

(c) Highway purposes

Nothing in this section shall be deemed to authorize the conveyance or other transference of any interest in real property which can be transferred to a State or political subdivision of a State for highway purposes under title 23.
(Aug. 26, 1935, ch. 684, § 2, as added July 7, 1960, Pub. L. 86-608, 74 Stat. 363.)

EXPLANATORY NOTE

Limited Repeal. Section 706(a) of the Federal Land Policy and Management Act of October 21, 1976 (90 Stat. 2793) repealed 40 U.S.C. § 345c insofar as it applies to the issuance of rights-of-way over, upon, under, and through the public lands and lands in the National Forest System. The 1976 Act appears in Volume IV in chronological order.

* * * * *

CHAPTER 12—CONSTRUCTION, ALTERATION, AND ACQUISITION OF PUBLIC BUILDINGS

§ 601. Prohibition on construction of buildings except by Administrator of General Services

No public building shall be constructed except by the Administrator, who shall construct such public building in accordance with this chapter.
(Pub. L. 86-249, § 2, Sept. 9, 1959, 73 Stat. 479.)

* * * * *

§ 612. Definitions

As used in this chapter—

(1) The term "public building" means any building, whether for single or multitenant occupancy, its grounds, approaches, and appurtenances,

which is generally suitable for office or storage space or both for the use of one or more Federal agencies or mixed ownership corporations, and shall include: (i) Federal office buildings,

* * * * *

and (x) similar Federal facilities, and (xi) any other buildings or construction projects the inclusion of which the President may deem, from time to time hereafter, to be justified in the public interest; but shall not include any such buildings and construction projects: (A) on the public domain (including that reserved for national forests and other purposes),

* * * * *

(D) on lands used in connection with Federal programs for agricultural, recreational, and conservation purposes, including research in connection therewith, (E) on or used in connection with river, harbor, flood control, reclamation or power projects, or for chemical manufacturing or development projects, or for nuclear production, research, or development projects,

* * * * *

(2) The term "Administrator" means the Administrator of General Services.

(3) The term "Federal agency" means any executive agency or any establishment in the legislative or judicial branch of the Government

* * * * *

(6) The terms "construct" and "alter" include preliminary planning, engineering, architectural, legal, fiscal, and economic investigations and studies, surveys, designs, plans, working drawings, specifications, procedures, and other similar actions necessary for the construction or alteration, as the case may be, of a public building.

* * * * *

(Pub. L. 86-249, § 13, Sept. 9, 1959, 73 Stat. 482; Pub. L. 90-448, title VIII, § 807(f), Aug. 1, 1968, 82 Stat. 544.)

TITLE 41, U.S. CODE—PUBLIC CONTRACTS

CHAPTER 1—GENERAL PROVISIONS

§ 5. Advertisements for proposals for purchases and contracts for supplies or services for Government departments; application to Government sales and contracts to sell and to Government corporations.

Unless otherwise provided in the appropriation concerned or other law, purchases and contracts for supplies or services for the Government may be made or entered into only after advertising a sufficient time previously for proposals, except (1) when the amount involved in any one case does not exceed $25,000, (2) when the public exigencies require the immediate delivery of the articles or performance of the service, (3) when only one source of supply is available and the Government purchasing or contracting officer shall so certify, or (4) when the services are required to be performed by the contractor in person and are (A) of a technical and professional nature or (B) under Government supervision and paid for on a time basis. Except (1) as authorized by section 1638 of Appendix to title 50, (2) when otherwise authorized by law, or (3) when the reasonable value involved in any one case does not exceed $500, sales and contracts of sale by the Government shall be governed by the requirements of this section for advertising.

In the case of wholly owned Government corporations, this section shall apply to their administrative transactions only.

(R.S. § 3709; Aug. 2, 1946, ch. 744, § 9(a), (c), 60 Stat. 809; June 30, 1949, ch. 288, title VI, § 602(f), formerly title V, § 502(e), 63 Stat. 400, renumbered Sept. 5, 1950, ch. 849, §§ 6(a), (b), 8(c), 64 Stat. 583, and amended Aug. 28, 1958, Pub. L. 85-800, § 7, 72 Stat. 967; July 25, 1974, Pub. L. 93-356, § 1, 88 Stat. 390; Dec. 1, 1983, Pub. L. 98-191, § 9(b), 97 Stat. 1332.)

EXPLANATORY NOTE

Reference in the Text. Section 1638 of Appendix to title 50, referred to in the text, dealt with disposals of excess property. Although it was repealed, it was replaced by similar provisions at 40 U.S.C. § 484, which appears in Volume II at page 958.

* * * * *

§ 8. Opening bids

Whenever proposals for supplies have been solicited, the parties responding to such solicitation shall be duly notified of the time and place of opening the bids, and be permitted to be present either in person or by attorney, and a record of each bid shall then and there be made.

(R.S. § 3710.)

§ 10a. American materials required for public use

Notwithstanding any other provision of law, and unless the head of the department or independent establishment concerned shall determine it to be inconsistent with the public interest, or the cost to be unreasonable, only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States, shall be acquired for public use. This section shall not apply with respect to articles, materials, or supplies for use outside the United States, or if articles, materials, or supplies of the class or kind to be used or the articles, materials, or supplies from which they are manufactured are not mined, produced, or manufactured, from which they are manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality.

(Mar. 3, 1933, ch. 212, title II, § 2, 47 Stat. 1502.)

EXPLANATORY NOTE

Popular Name. Sections 1 to 3 of the Act of March 3, 1933, ch. 212, title III, 47 Stat. 1520, which are classified to sections 10a to 10c of title 41, are popularly known as the Buy American Act.

§ 10b. Contracts for public works; specification for use of American materials; blacklisting contractors violating requirements

(a) Every contract for the construction, alteration, or repair of any public building or public work in the United States growing out of an appropriation heretofore made or hereafter to be made shall contain a provision that in the performance of the work the contractor, subcontractors, material men, or suppliers, shall use only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States except as provided in section 10a of this title: *Provided, however,* That if the head of the department or independent establishment making the contract shall find that in respect to some particular articles, materials, or supplies it is impracticable to make such requirement or that it would unreasonably increase the cost, an exception shall be noted in the specifications as to that particular article, material, or supply, and a public record made of the findings which justified the exception.

(b) If the head of a department, bureau, agency, or independent establishment which has made any contract containing the provision required by subsection (a) of this section finds that in the performance of such contract there has been a failure to comply with such provisions, he shall make public his findings, including therein the name of the contractor obligated under such contract, and no other contract for the construction, alteration,

or repair of any public building or public work in the United States or elsewhere shall be awarded to such contractor, subcontractors, material men, or suppliers with which such contractor is associated or affiliated, within a period of three years after such findings is made public.
(Mar. 3, 1933, ch. 212, title III, § 3, 47 Stat. 1520.)

§ 10c. Definition of terms used in sections 10a and 10b

When used in sections 10a to 10c of this title—

(a) The term "United States", when used in a geographical sense, includes the United States and any place subject to the jurisdiction thereof;

(b) The terms "public use", "public building", and "public work" shall mean use by, public building of, and public work of, the United States, the District of Columbia, Puerto Rico, American Samoa, the Canal Zone, and the Virgin Islands.
(Mar. 3, 1933, ch. 212, title III, § 1, 47 Stat. 1520; Proc. No. 2695, eff. July 4, 1946, 11 F.R. 7515, 60 Stat. 1352; June 25, 1959, Pub. L. 86-70, § 43, 73 Stat. 151; July 12, 1960, Pub. L. 86-624, § 28, 74 Stat. 419.)

§ 10d. Clarification of Congressional intent regarding sections 10a and 10b(a)

In order to clarify the original intent of Congress, hereafter, section 10a of this title and that part of section 10(a) of this title preceding the words "*Provided, however,*" shall be regarded as requiring the purchase, for public use within the United States, of articles, materials, or supplies manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality, unless the head of the department or independent establishment concerned shall determine their purchase to be inconsistent with the public interest or their cost to be unreasonable.
(Oct. 29, 1949, ch. 787, title VI, § 633, 63 Stat. 1024.)

§ 11. No contracts or purchases unless authorized or under adequate appropriation; report to the Congress

(a) No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except

* * * * *

(R.S. § 3732; June 12, 1960, ch. 3078, 34 Stat. 255; Oct. 15, 1966, Pub. L. 80-687, title VI, § 612(e), 80 Stat. 993; Oct. 30, 1984, Pub. L. 98-557, § 17(e), 98 Stat. 2868.)

* * * * *

§ 12. No contract to exceed appropriation

No contract shall be entered into for the erection, repair, or furnishing of any public building, or for any public improvement which shall bind the

Government to pay a larger sum of money than the amount in the Treasury appropriated for the specific purpose.
(R.S. § 3733.)

§ 13. Contracts limited to one year

Except as otherwise provided, it shall not be lawful for any of the executive departments to make contracts for stationery or other supplies for a longer term than one year from the time the contract is made.
(R.S. § 3735.)

§ 14. Restriction on purchase of land

No land shall be purchased on account of the United States, except under a law authorizing such purchase.
(R.S. § 3736.)

* * * * *

§ 20. Deposit of contracts

All contracts to be made, by virtue of any law, and requiring the advance of money, or in any manner connected with the settlement of public accounts, shall be deposited promptly in the General Accounting Office: *Provided,* That this section shall not apply to the existing laws in regard to the contingent funds of Congress.
(R.S. § 3743; Feb. 27, 1877, ch. 69, § 1, 19 Stat. 249; July 31, 1894, ch. 174, § 18, 28 Stat. 210; June 10, 1921, ch. 18, §§ 304, 310, 42 Stat. 24, 25.)

* * * * *

§ 20b. Exemption from deposit of leases, contracts, etc., concerning use of lands or waters under jurisdiction of Department of the Interior

Leases, permits, licenses, contracts, agreements, and other instruments providing for payments to the United States on account of the use of lands or waters under the jurisdiction of the Department of the Interior, or on account of the sale of products of such lands or waters, or on account of other transactions incident to the administration of such lands or waters, including contributions by cooperators, but excluding sales of used equipment, shall be exempt from the provisions of section 20 of this title, when the lease or other instruments do not require payment to the Government in excess of $300 in any one fiscal year: *Provided, however,* That the Secretary of the Interior may prescribe from time to time regulations requiring that originals or copies of any class or group of documents within the foregoing exemption, in the circumstances and upon the conditions designated by him in such regulations, shall be deposited in the General Accounting Office for audit purposes.
(Nov. 28, 1943, ch. 328, 57 Stat. 592.)

§ 22. Interest of Member of Congress

In every contract or agreement to be made or entered into, or accepted by or on behalf of the United States, there shall be inserted an express condition that no Member of or Delegate to Congress shall be admitted to any share or part of such contract or agreement, or to any benefit to arise thereupon. Nor shall the provisions of this section apply to any contracts or agreements heretofore or hereafter entered into under the Agricultural Adjustment Act [7 U.S.C. 601 et seq.], the Federal Farm Loan Act, the Emergency Farm Mortgage Act of 1933, the Federal Farm Mortgage Corporation Act, the Farm Credit Act of 1933, and the Home Owners' Loan Act of 1933 [12 U.S.C. 1461 et seq.], and shall not apply to contracts or agreements of a kind which the Secretary of Agriculture may enter into with farmers: *Provided,* That such exemption shall be made a matter of public record.

(R.S. § 3741; Feb. 27, 1877, ch. 69, § 1, 19 Stat. 249; Jan. 25, 1934, ch. 5, 48 Stat. 337; June 27, 1934, ch. 847, title V, § 510, 48 Stat. 1264; Aug. 26, 1937, ch. 821, 50 Stat. 838.)

§ 23. Orders or contracts for material placed with Government-owned establishments deemed obligations

All orders or contracts for work or material or for the manufacture of material pertaining to approved projects heretofore or hereafter placed with Government-owned establishments shall be considered as obligations in the same manner as provided for similar orders or contracts placed with commercial manufacturers or private contractors, and the appropriations shall remain available for the payment of the obligations so created as in the case of contracts or orders with commercial manufacturers or private contractors.

(June 5, 1920, ch. 240, 41 Stat. 975; July 1, 1922, ch. 259, 42 Stat. 812; June 2, 1937, ch. 293, 50 Stat. 245.)

* * * * *

§ 35. Contracts for materials, etc., exceeding $10,000; representations and stipulations

In any contract made and entered into by any executive department, independent establishment, or other agency or instrumentality of the United States, or by the District of Columbia, or by any corporation all the stock of which is beneficially owned by the United States (all the foregoing being hereinafter designated as agencies of the United States), for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding $10,000, there shall be included the following representations and stipulations:

(a) That the contractor is the manufacturer of or a regular dealer in the materials, supplies, articles, or equipment to be manufactured or used in the performance of the contract;

(b) That all persons employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract will be paid, without subsequent deduction or rebate on any account, not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract;

(c) That no person employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract shall be permitted to work in excess of forty hours in any one week: *Provided,* That the provisions of this subsection shall not apply to any employer who shall have entered into an agreement with his employees pursuant to the provisions of paragraphs (1) or (2) of subsection (b) of section 207 of title 29;

(d) That no male person under sixteen years of age and no female person under eighteen years of age and no convict labor will be employed by the contractor in the manufacture or production or furnishing of any of the materials, supplies, articles, or equipment included in such contract, except that this section, or any other law or Executive order containing similar prohibitions against purchase of goods by the Federal Government, shall not apply to convict labor which satisfies the conditions of section 1761(c) of title 18; and

(e) That no part of such contract will be performed nor will any of the materials, supplies, articles, or equipment to be manufactured or furnished under said contract be manufactured or fabricated in any plants, factories, buildings, or surroundings or under working conditions which are unsanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of said contract. Compliance with the safety, sanitary, and factory inspection laws of the State in which the work or part thereof is to be performed shall be prima-facie evidence of compliance with this subsection.

(June 30, 1936, ch. 881, § 1, 49 Stat. 2036; May 13, 1942, ch. 306, 56 Stat. 277; Pub. L. 90-351, title I, § 819(b), formerly § 827(b), as added Dec. 27, 1979, Pub. L. 96-157, § 2, 93 Stat. 1215, and renumbered Oct. 12, 1984, Pub. L. 98-473, title II, § 609B(f), 98 Stat. 2093; Nov. 8, 1985, Pub. L. 99-145, title XII, § 1241(b), 99 Stat. 734.)

EXPLANATORY NOTE

Popular Name. Sections 35 to 45 of title 41 are popularly known as the Walsh-Healey Act.

§ 36. Liability for contract breach; cancellation; completion by Government agency; employee's wages

Any breach or violation of any of the representations and stipulations in any contract for the purposes set forth in section 35 of this title shall render the party responsible therefor liable to the United States of America for liquidated damages, in addition to damages for any other breach of such contract, the sum of $10 per day for each male person under sixteen years of age or each female person under eighteen years of age, or each convict laborer knowingly employed in the performance of such contract, and a sum equal to the amount of any deductions, rebates, refunds, or underpayment of wages due to any employee engaged in the performance of such contract; and, in addition, the agency of the United States entering into such contract shall have the right to cancel same and to make open-market purchases or enter into other contracts for the completion of the original contract, charging any additional cost to the original contractor. Any sums of money due to the United States of America by reason of any violation of any of the representations and stipulations of said contract set forth in section 35 of this title may be withheld from any amounts due on any such contracts or may be recovered in suits brought in the name of the United States of America by the Attorney General thereof. All sums withheld or recovered as deductions, rebates, refunds, or underpayments of wages shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employees who have been paid less than minimum rates of pay as set forth in such contracts and on whose account such sums were withheld or recovered: *Provided,* That no claims by employees for such payments shall be entertained unless made within one year from the date of actual notice to the contractor of the withholding or recovery of such sums by the United States of America.

(June 30, 1936, ch. 881, § 2, 49 Stat. 2037.)

§ 37. Distribution of list of persons breaching contract; future contracts prohibited

The Comptroller General is authorized and directed to distribute a list to all agencies of the United States containing the names of persons or firms found by the Secretary of Labor to have breached any of the agreements or representations required by sections 35 to 45 of this title. Unless the Secretary of Labor otherwise recommends no contracts shall be awarded to such persons or firms or to any firm, corporation, partnership, or association in which such persons or firms have a controlling interest until three years have elapsed from the date the Secretary of Labor determines such breach to have occurred.

(June 30, 1936, ch. 881, § 3, 49 Stat. 2037.)

§ 38. Administration of Walsh-Healey provisions; officers and employees; appointment; investigations; rules and regulations

The Secretary of Labor is authorized and directed to administer the provisions of sections 35 to 45 of this title and to utilize such Federal officers and employees and, with the consent of the State, such State and local officers and employees as he may find necessary to assist in the administration of said sections and to prescribe rules and regulations with respect thereto. The Secretary shall appoint, subject to chapter 51 and subchapter

III of chapter 53 of title 5, an administrative officer, and such attorneys and experts, and other employees with regard to existing laws applicable to the employment and compensation of officers and employees of the United States, as he may from time to time find necessary for the administration of sections 35 to 45 of this title. The Secretary of Labor or his authorized representatives shall have power to make investigations and findings as provided in sections 35 to 45 of this title, and prosecute any inquiry necessary to his functions in any part of the United States. The Secretary of Labor shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of sections 35 to 45 of this title.
(June 30, 1936, ch. 881, § 4, 49 Stat. 2038; Oct. 28, 1949, ch. 782, title XI, § 1106(a),63 Stat. 972.)

* * * * *

§ 40. Exceptions from Walsh-Healey provisions; modification of contracts; variations; overtime; suspension of representations and stipulations

Upon a written finding by the head of the contracting agency or department that the inclusion in the proposal or contract of the representations or stipulations set forth in section 35 of this title will seriously impair the conduct of Government business, the Secretary of Labor shall make exceptions in specific cases or otherwise when justice or public interest will be served thereby. Upon the joint recommendation of the contracting agency and the contractor, the Secretary of Labor may modify the terms of an existing contract respecting minimum rates of pay and maximum hours of labor as he may find necessary and proper in the public interest or to prevent injustice and undue hardship. The Secretary of Labor may provide reasonable limitations and may make rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of sections 35 to 45 of this title respecting minimum rates of pay and maximum hours of labor or the extent of the application of said sections to contractors, as hereinbefore described. Whenever the Secretary of Labor shall permit an increase in the maximum hours of labor stipulated in the contract, he shall set a rate of pay for any overtime, which rate shall be not less than one and one-half times the basic hourly rate received by any employee affected: *Provided,* That whenever in his judgment such course is in the public interest, the President is authorized to suspend any or all of the representations and stipulations contained in section 35 of this title.
(June 30, 1936, ch. 881, § 6, 49 Stat. 2038; June 28, 1940, ch. 440, title I, § 13, 54 Stat. 681.)

§ 41. "Person" defined in Walsh-Healey provisions

Whenever used in sections 35 to 45 of this title, the word "person" includes one or more individuals, partnerships, associates, corporations, legal representatives, trustees, trustees in cases under title 11, or receivers.

(June 30, 1936, ch. 881, § 7, 49 Stat. 2039; Nov. 6, 1978, Pub. L. 95-598, title III, § 326, 92 Stat. 2679.)

§ 42. Effect of Walsh-Healey provisions on other laws

The provisions of sections 35 to 45 of this title shall not be construed to modify or amend Title III of the act entitled "An Act making appropriations for the Treasury and Post Office Departments for the fiscal year ending June 30, 1934, and for other purposes", approved May 3, 1933 (commonly known as the Buy American Act), nor shall the provisions of sections 35 to 45 of this title be construed to modify or amend the Act entitled "An Act relating to the rate of wages for laborers and mechanics employed on public buildings of the United States and the District of Columbia by contractors and subcontractors, and for other purposes", approved March 3, 1931 (commonly known as the Bacon-Davis Act), as amended from time to time [40 U.S.C. 276a et seq.], nor the labor provisions of Title II of the National Industrial Recovery Act, approved June 16, 1933, as extended, or of section 7 of the Emergency Relief Appropriation Act, approved April 8, 1935; nor shall the provisions of sections 35 to 45 of this title be construed to modify or amend chapter 307 and section 4162 of title 18.
(June 30, 1936, ch. 881, § 8, 49 Stat. 2039.)

§ 43. Walsh-Healey provisions not applicable to certain contracts

Sections 35 to 45 of this title shall not apply to purchases of such materials, supplies, articles, or equipment as may usually be bought in the open market; nor shall they apply to perishables, including dairy, livestock and nursery products, or to agricultural or farm products processed for first sale by the original producers; nor to any contracts made by the Secretary of Agriculture for the purchase of agricultural commodities or the products thereof. Nothing in said sections shall be construed to apply to carriage or freight or personnel by vessel, airplane, bus, truck, express, or railway line where published tariff rates are in effect or to common carriers subject to the Communications Act of 1934 [47 U.S.C. 151 et seq.].
(June 30, 1936, ch. 881, § 9, 49 Stat. 2039.)

§ 43a. Administrative procedure provisions

(a) Applicability

Notwithstanding any provision of section 553 of title 5, subchapter II of chapter 5, and chapter 7, of title 5 shall be applicable in the administration of sections 35 to 39 and 41 to 43 of this title.

(b) Wage determination; administrative review

All wage determinations under section 35(b) of this title shall be made on the record after opportunity for a hearing. Review of any such wage determination, or of the applicaiblity of any such wage determination, may be had within ninety days after such determination is made in the manner provided in chapter 7 of title 5 by any person adversely affected or aggrieved thereby, who shall be deemed to include any manufacturer of, or regular dealer in, materials, supplies, articles or equipment purchased or to be purchased by the Government from any source, who is in any industry to which such wage determination is applicable.

(c) Judicial review

Notwithstanding the inclusion of any stipulations required by any provision of sections 35 to 45 of this title in any contract subject to said sections, any interested person shall have the right of judicial review of any legal question which might otherwise be raised, including, but not limited to, wage determinations and the interpretation of the terms "locality", "regular dealer", "manufacturer", and "open market".
(June 30, 1936, ch. 881, § 10, as added June 30, 1952, ch. 530, title III, § 301, 66 Stat. 308.)

§ 44. Separability of Walsh-Healey provisions

If any provision of sections 35 to 45 of this title, or the application thereof to any persons or circumstances, is held invalid, the remainder of said sections, and the application of such provisions to other persons or circumstances, shall not be affected thereby.
(June 30, 1936, ch. 881, § 11, formerly § 10, 49 Stat. 2039, renumbered June 30, 1952, ch. 530, title III, § 301, 66 Stat. 308.)

§ 45. Effective date of Walsh-Healey provisions; exception as to representations with respect to minimum wages

Sections 35 to 45 of this title shall apply to all contracts entered into pursuant to invitations for bids issued on or after ninety days from June 30, 1936: *Provided, however,* That the provisions requiring the inclusion of representations with respect to minimum wages shall apply only to purchases or contracts relating to such industries as have been the subject matter of a determination by the Secretary of Labor.
(June 30, 1936, ch. 881, § 12, formerly § 11, 49 Stat. 2039, renumbered June 30, 1952, ch. 530, title III, § 301, 66 Stat. 308.)

* * * * *

§ 51. Fees or kick-backs by subcontractors on negotiated contracts; recovery by United States; conclusive presumptions; withholding of payments

The payment of any fee, commission, or compensation of any kind or the granting of any gift or gratuity of any kind, either directly or indirectly, by or on behalf of a subcontractor, as defined in section 52 of this title, (1) to any officer, partner, employee, or agent of a prime contractor holding a negotiated contract entered into by any department, agency, or establishment of the United States for the furnishing of supplies, materials, equipment or services of any kind whatsoever; or to any such prime contractor or (2) to any officer, partner, employee, or agent of a higher tier subcontractor holding a subcontract under the prime contract, or to any such subcontractor either as an inducement for the award of a subcontract or order from the prime contractor or any subcontractor, or as an acknowledgment of a subcontract or order previously awarded, is prohibited. The amount of any such fee, commission, or compensation or the cost or expense of any such gratuity or gift, whether heretofore or hereafter paid or incurred by the subcontractor, shall not be charged, either directly or indirectly, as a part of the contract price charged by the subcontractor to the prime contractor or higher tier subcontractor. The amount of any such fee, cost, or expense shall be recoverable on behalf of the United States from the subcontractor or the recipient thereof by setoff of moneys otherwise going to the subcontractor either directly by the United States, or by a prime contractor under any contract or by an action in an appropriate court of the United States. Upon a showing that a subcontractor paid fees, commissions, or compensation or granted gifts or gratuities to an officer, partner, employee, or agent of a prime contractor or of another higher tier subcontractor, in connection with the award of a subcontract or order thereunder, it shall be conclusively presumed that the cost of such expense was included in the price of the subcontract or order and ultimately borne by the United States. Upon the direction of the contracting department or agency or of the General Accounting Office, the prime contractor shall withhold from sums otherwise due a subcontractor any amount reported to have been found to have been paid by a subcontractor as a fee, commission, or compensation or as a gift or gratuity to an officer, partner, employee, or agent of the prime contractor or another higher tier subcontractor.

(Mar. 8, 1946, ch. 80, § 1, 60 Stat. 37; Sept. 2, 1960, Pub. L. 86–695, 74 Stat. 740.)

§ 52. Definitions

For the purpose of sections 51 to 54 of this title, the term "subcontractor" is defined as any person, including a corporation, partnership, or business association of any kind, who holds an agreement or purchase order to perform all or any part of the work or to make or to furnish any article or service required for the performance of a negotiated contract or of a subcontract entered into thereunder; the term "person" shall include any subcontractor, corporation, association, trust, joint-stock company, partnership, or individual; and the term "negotiated contract" means made without formal advertising.

(Mar. 8, 1946, ch. 80, § 2, 60 Stat. 38; Sept. 2, 1960, Pub. L. 86–695, 74 Stat. 740.)

§ 53. Power of General Accounting Office as to fees and kick-backs

For the purpose of ascertaining whether such fees, commissions, compensation, gifts, or gratuities have been paid or granted by a subcontractor, the General Accouting Office shall have the power to inspect the plants and to audit the books and records of any prime contractor or subcontractor engaged in the performance of a negotiated contract.

(Mar. 8, 1946, ch. 80, § 3, 60 Stat. 38; Sept. 2, 1960, Pub. L. 86–695, 74 Stat. 741.)

§ 54. Penalties as to fees and kick-backs

Any person who shall knowingly, directly or indirectly, make or receive any such prohibited payment shall be fined not more than $10,000 or be imprisoned for not more than two years, or both.

(Mar. 8, 1946, ch. 80, § 4, 60 Stat. 38; Sept. 2, 1960, Pub. L. 86–695, 74 Stat. 741.)

* * * * *

CHAPTER 4—PROCUREMENT PROCEDURES

SUBCHAPTER IV—PROCUREMENT PROVISIONS

§ 251. Declaration of purpose of this subchapter

The purpose of this subchapter is to facilitate the procurement of property and services.

(June 30, 1949, ch. 288, title III, § 301, 63 Stat. 393; July 12, 1952, ch. 703, § 1(m), 66 Stat. 594.)

§ 252. Purchases and contracts for property

(a) Applicability of subchapter; delegation of authority

Executive agencies shall make purchases and contracts for property and services in accordance with the provisions of this subchapter and implementing regulations of the Administrator; but this subchapter does not apply—

(1) to the Department of Defense, the Coast Guard, and the National Aeronautics and Space Administration; or

(2) when this subchapter is made inapplicable pursuant to section 474 of title 40 or any other law, but when this subchapter is made inapplicable by any such provision of law, sections 5 and 8 of this title shall be applicable in the absence of authority conferred by statute to procure without advertising or without regard to said section 5 of this title.

(b) Small business concerns; share of business

It is the declared policy of the Congress that a fair proportion of the total purchases and contracts for property and services for the Government shall be placed with small business concerns.

(c) Authorization of erection, repair, or furnishing of public buildings or improvements; contracts for construction or repair of buildings, roads, sidewalks, sewers, mains, etc.; Federal Highway Lands Program

(1) This subchapter does not (A) authorize the erection, repair, or furnishing of any public building or public improvement, but such authori-

zation shall be required in the same manner as heretofore, or (B) permit any contract for the construction or repair of buildings, roads, sidewalks, sewers, mains, or similar items using procedures other than sealed-bid procedures under section 253(a)(2)(A) of this title, if the conditions set forth in section 253(a)(2)(A) of this title apply or the contract is to be performed outside the United States.

(2) Section 253(a)(2)(A) of this title does not require the use of sealed-bid procedures in cases in which section 204(e) of title 23 applies.

(June 30, 1949, ch. 288, title III, § 302, 63 Stat. 393; July 12, 1952, ch. 703, § 1(m), 66 Stat. 594; Aug. 28, 1958, Pub. L. 85-800, §§ 1-3, 72 Stat. 966; Nov. 8, 1965, Pub. L. 89-343, §§ 1, 2, 79 Stat. 1303; Nov. 8, 1965, Pub. L. 89-348, § 1(2), 79 Stat. 1310; Mar. 16, 1968, Pub. L. 90-268, § 4, 82 Stat. 50; July 25, 1974, Pub. L. 93-356, § 3, 88 Stat. 390; Dec. 1, 1983, Pub. L. 98-191, § 9(a)(1), 97 Stat. 1331; July 18, 1984, Pub. L. 98-369, div. B, title VII, § 2714(a)(1), 98 Stat. 1184.)

EXPLANATORY NOTE

Cross Reference: Bonneville Power Administration. Section 474 of title 40, referred to in subsection (a)(2), provides in part: "Nothing in this Act shall impair or affect any authority of—

* * * * *

(20) the Secretary of the Interior with respect to procurement for program operations under the Bonneville Project Act of 1937 (50 Stat. 731), as amended;"

The reference to "this Act" is to the Federal Property and Administrative Services Act of 1949, ch. 288, 63 Stat. 377, approved June 30, 1949. Extracts from that act dealing with procurement, as amended, appear throughout chapter 4 of title 41 herein; extracts dealing with property utilization and disposal appear in volume II at page 956. The Bonneville Project Act of 1937 appears in Volume I at page 568.

§ 253. Competition requirements

(a) Procurement through full and open competition; competitive procedures

(1) Except as provided in subsections (b), (c), and (g) of this section and except in the case of procurement procedures otherwise expressly authorized by statute, an executive agency in conducting a procurement for property for services—

(A) shall obtain full and open competition through the use of competitive procedures in accordance with the requirements of this title and the modifications to regulations promulgated pursuant to section 2752 of the Competition in Contracting Act of 1984 [41 U.S.C. 403 note]; and

(B) shall use the competitive procedure or combination of competitive procedures that is best suited under the circumstances of the procurement.

(2) In determining the competitive procedures appropriate under the circumstance, an executive agency—

(A) shall solicit sealed bids if—

(i) time permits the solicitation, submission, and evaluation of sealed bids;

(ii) the award will be made on the basis of price and other price-related factors;

(iii) it is not necessary to conduct discussions with the responding sources abut their bids; and

(iv) there is a reasonable expectation of receiving more than one sealed bid; and

(B) shall request competitive proposals if sealed bids are not appropriate under clause (A).

(b) Exclusion of particular source; restriction of solicitation to small busines concerns

(1) An executive agency may provide for the procurement of property or services covered by this section using competitive procedures but excluding a particular source in order to establish or maintain any alternative source or sources of supply for that property or service if the agency head determines that to do so—

(A) would increase or maintain competition and would likely result in reduced overall costs for such procurement, or for any anticipated procurement, of such property or services;

(B) would be in the interest of national defense in having a facility (or a producer, manufacturer, or other supplier) available for furnishing the property or service in case of a national emergency or industrial mobilization; or

(C) would be in the interest of national defense in establishing or maintaining an essential engineering, research, or development capability to be provided by an educational or other nonprofit institution or a federally funded research and development center.

(2) An executive agency may provide for the procurement of property or services covered by this section using competitive procedures, but excluding other than small business concerns in furtherance of sections 638 and 644 of title 15;

(3) A contract awarded pursuant to the competitive procedures referred to in paragraphs (1) and (2) shall not be subject to the justification and approval required by subsection (f)(1) of this section.

(c) Use of noncompetitive procedures

An executive agency may use procedures other than competitive procedures only when—

(1) the property or services needed by the executive agency are available from only one responsible source and no other type of property or services will satisfy the needs of the executive agency;

(2) the executive agency's need for the property or services is of such an unusual and compelling urgency that the Government would be seriously injured unless the executive agency is permitted to limit the number of sources from which it solicits bids or proposals;

(3) it is necessary to award the contract to a particular source or sources in order (A) to maintain a facility, producer, manufacturer, or other supplier available for furnishing property or services in case of a national

emergency or to achieve industrial mobilization, or (B) to establish or maintain an essential engineering, research, or development capability to be provided by an educational or other nonprofit institution or a federally funded research and development center;

(4) the terms of an international agreement or treaty between the United States Government and a foreign government or international organization, or the written directions of a foreign government reimbursing the executive agency for the cost of the procurement of the property or services for such government, have the effect of requiring the use of procedures other than competitive procedures;

(5) a statute expressly authorizes or requires that the procurement be made through another executive agency or from a specified source, or the agency's need is for a brand-name commercial item for authorized resale;

(6) the disclosure of the executive agency's needs would compromise the national security unless the agency is premitted to limit the number of sources from which it solicits bids or proposals; or

(7) the head of the executive agency—

(A) determines that is is necessary in the public interest to use procedures other than competitive procedures in the particular procurement concerned, and

(B) notifies the Congress in writing of such determination not less than 30 days before the award of the contract.

(d) Property or services deemed available from only one source; nondelegable authority

(1) For the purposes of applying subsection (c)(1) of this section—

(A) in the case of a contract for property or services to be awarded on the basis of acceptance of an unsolicited research proposal, the property or services shall be considered to be available from only one source if the source has submitted an unsolicited research proposal that demonstrates a unique and innovative concept the substance of which is not otherwise available to the United States and does not resemble the substance of a pending competitive procurement; and

(B) in the case of a follow-on contract for the continued development or production of a major system or highly specialized equipment when it is likely that award to a source other than the original source would result in (i) substantial duplication of cost to the Government which is not expected to be recovered through competition, or (ii) unacceptable delays in fulfilling the executive agency's needs, such property may be deemed to be available only from the original source and may be procured through procedures other than competitive procedures.

(2) The authority of the head of an executive agency under subsection (c)(7) of this section may not be delegated.

(e) Offer requests to potential sources

An executive agency using procedures other than competitive procedures to procure property or services by reason of the application of subsection (c)(2) or (c)(6) of this section shall request offers from as many potential sources as is practicable under the circumstances.

(f) Justification for use of noncompetitive procedures

(1) Except as provided in paragraph (2), an executive agency may not award a contract using procedures other than competitive procedures unless—

(A) the contracting officer for the contract justifies the use of such procedures in writing and certifies the accuracy and completeness of the justification;

(B) the justification is approved—

(i) in the case of a contract for an amount exceeding $100,000 (but equal to or less than $1,000,000), by the competition advocate for the procuring activity (without further delegation);

(ii) in the case of a contract for an amount exceeding $1,000,000 (but equal to or less than $10,000,000), by the head of the procuring activity or a delegate who, if a member of the armed forces, is a general or flag officer or, if a civilian, is serving in a position in grade GS-16 or above under the General Schedule (or in a comparable or higher position under another schedule); or

(iii) in the case of a contract for an amount exceeding $10,000,000, by the senior procurement executive of the agency designated pursuant to section 414(3) of this title (without further delegation); and

(C) any required notice has been published with respect to such contract pursuant to section 416 of this title and all bids or proposals received in response to such notice have been considered by such executive agency.

(2) In the case of a procurement permitted by subsection (c)(2), the justification and approval required by paragraph (1) may be made after the contract is awarded. The justifiation and approval required by paragraph (1) is not required—

(A) when a statute expressly requires that the procurement be made from a specified source;

(B) when the agency's need is for a brand-name commercial item for authorized resale;

(C) in the case of a procurement permitted by subsection (c)(7) of this section; or

(D) in the case of a procurement conducted under (i) the Act of June 25, 1938 (41 U.S.C. 46 et seq.), popularly referred to as the Wagner-O'Day Act, or (ii) section 637(a) of title 15.

(3) The justification required by paragraph (1)(A) shall include—

(A) a description of the agency's needs;

(B) an identification of the statutory exception from the rquirement to use competitive procedures and a demonstration, based on the proposed contractor's qualifications or the nature of the procurement, of the reasons for using that exception;

(C) a determination that the anticipated cost will be fair and reasonable;

(D) a description of the market survey conducted or a statement of the reasons a market survey was not conducted;

(E) a listing of the sources, if any, that expressed in writing an interest in the procurement; and

(F) a statement of the actions, if any, the agency may take to remove or overcome a barrier to competition before a subsequent procurement for such needs.

(4) The justification required by paragraph (1)(A) and any related information shall be made available for inspection by the public consistent with the provisions of section 552 of title 5.

(5) In no case may an executive agency—

(A) enter into a contract for property or services using procedures other than competitive procedures on the basis of the lack of advance planning or concerns related to the amount of funds available to the agency for procurement functions; or

(B) procure property or services from another executive agency unless such other executive agency complies fully with the requirements of this subchapter in its procurement of such property or services.

The restriction set out in clause (B) is in addition to, and not in lieu of, any other restriction provided by law.

(g) Simplified procedures for small purchases

(1) In order to promote efficiency and economy in contracting and to avoid unnecessary burdens for agencies and contractors, the regulations modified, in accordance with section 2752 of the Competition in Contracting Act of 1984 [41 U.S.C. 403 note], shall provide for special simplified procedures for small purchases of property and services.

(2) For the purposes of this subchapter, a small purchase is a purchase or contract for an amount which does not exceed $25,000.

(3) A proposed purchase or contract for an amount above $25,000 may not be divided into several purchases or contracts for lesser amounts in order to use the small purchase procedures required by paragraph (1).

(4) In using small purchase procedures, an executive agency shall promote competition to the maximum extent practicable.

(June 30, 1949, ch. 288, title III, § 303, 63 Stat. 395; July 12, 1952, ch. 703, § 1(m), 66 Stat. 594; Mar. 16, 1968, Pub. L. 90-268, § 2, 82 Stat. 49; July 18, 1984, Pub. L. 98-369, div. B, title VII, § 2711(a)(1), 98 Stat. 1175; Oct. 30, 1984, Pub. L. 98-577, title V, § 504(a)(1), (2), 98 Stat. 3086; Nov. 8, 1985, Pub. L. 99-145, title IX, § 961(a)(2), title XIII, § 1304(c)(2), (3), 99 Stat. 703, 742.)

§ 253a. Planning and solicitation requirements

(a)(1) In preparing for the procurement of property or services, an executive agency shall—

(A) specify its needs and solicit bids or proposals in a manner designed to achieve full and open competition for the procurement;

(B) use advance procurement planning and market research; and

(C) develop specifications in such manner as is necessary to obtain full and open competition with due regard to the nature of the property or services to be acquired.

(2) Each solicitation under this subchapter shall include specifications which—

(A) consistent with the provisions of this subchapter, permit full and open competition;

(B) include restrictive provisions or conditions only to the extent necessary to satisfy the needs of the executive agency or as authorized by law.

(3) For the purposes of paragraphs (1) and (2), the type of specification included in a solicitation shall depend on the nature of the needs of the executive agency and the market available to satisfy such needs. Subject to such needs, specifications may be stated in terms of—

(A) function, so that a variety of products or services may qualify;

(B) performance, including specifications of the range of acceptable characteristics or of the minimum acceptable standards; or

(C) design requirements.

(b) In addition to the specifications described in subsection (a) of this section, each solicitation for sealed bids or competitive proposals (other than for small purchases) shall at a minimum include—

(1) a statement of—

(A) all significant factors (including price) which the executive agency reasonably expects to consider in evaluating sealed bids or competitive proposals; and

(B) the relative importance assigned to each of those factors; and

(2)(A) in the case of saled bids—

(i) a statement that sealed bids will be evaluated without discussions with the bidders; and

(ii) the time and place for the opening of the sealed bids; or

(B) in the case of competitive proposals—

(i) a statement that the proposals are intended to be evaluated with, and awards made after, discussions with the offerors, but might be evaluated and awarded without discussions with the offerors; and

(ii) the time and place for submission of proposals.

(June 30, 1949, ch. 288, title III, § 303A, as added July 18, 1984, Pub. L. 98-369, div. B, title VII, § 2711(a)(2), 98 Stat. 1178.)

§ 253b. Evaluation and award

(a) Basis

An executive agency shall evaluate sealed bids and competitive proposals based solely on the factors specified in the solicitation.

(b) Rejection of bids or proposals

All sealed bids or competitive proposals received in response to a solicitation may be rejected if the agency head determines that such action is in the public interest.

(c) Opening of bids; promptness of award; written notice

Sealed bids shall be opened publicly at the time and place stated in the solicitation. The executive agency shall evaluate the bids without discussions with the bidders and, except as provided in subsection (b) of this section, shall award a contract with reasonable promptness to the responsible source whose bid conforms to the solicitation and is most advantageous to the United States, considering only price and the other price-related factors included in the solicitation. The award of a contract shall be made by transmitting written notice of the award to the successful bidder.

(d) Discussions with offerors; written notification

(1) The executive agency shall evaluate competitive proposals and may award a contract—

(A) after discussions conducted with the offerors at any time after receipt of the proposals and before the award of the contract; or

(B) without discussions with the offerors (other than discussions conducted for the purpose of minor clarification) when it can be clearly demonstrated from the existence of full and open competition or accurate prior cost experience with the product or service that acceptance of an initial proposal without discussions would result in the lowest overall cost to the Government.

(2) In the case of award of a contract under paragraph (1)(A), the executive agency shall conduct, before such award, written or oral discussions with all responsible sources who submit proposals within the competitive range, considering only price and the other factors included in the solicitation.

(3) In the case of award of a contract under paragraph (1)(B), the executive agency shall award the contract based on the proposals as received (and as clarified, if necessary, in discussions conducted for the purpose of minor clarification).

(4) Except as otherwise provided in subsection (b) of this section, the executive agency shall award a contract with reasonable promptness to the responsible source whose proposal is most advantageous the United States, considering only price and the other factors included in the solicitation. The executive agency shall award the contract by transmitting written notice of the award to such source and shall promptly notify all other offerors of the rejection of their proposals.

(e) Antitrust violations

If the agency head considers that a bid or proposal evidences a violation of the antitrust laws, such agency head shall refer the bid or proposal to the Attorney General for appropriate action.

(f) Planning for future competition

(1)(A) In preparing a solicitation for the award of a development contract for a major system, the head of an agency shall consider requiring in the solicitation that an offeror include in its offer proposals described in subparagraph (B). In determining whether to require such proposals, the head of the agency shall give due consideration to the purposes for which the system is being procured and the technology necessary to meet the system's required capabilities. If such proposals are required, the head of the agency shall consider them in evaluating the offeror's price.

(B) The proposals that the head of an agency is to consider requiring in a solicitation for the award of a development contract are the following:

(i) Proposals to incorporate in the design of the major system items which are currently available within the supply system of the Federal agency responsible for the major system, available elsewhere in the national supply system, or commercially available from more than one source.

(ii) With respect to items that are likely to be required in substantial quantities during the system's service life, proposals to incorporate in the design of the major system items which the United States will be able to acquire competitively in the future.

(2)(A) In preparing a solicitation for the award of a production contract for a major system, the head of an agency shall consider requiring in the solicitation that an offeror include in its offer proposals described in subparagraph (B). In determining whether to require such proposals, the head of the agency shall give due consideration to the purposes for which the system is being procured and the technology necessary to meet the system's required capabilities. If such proposals are required, the head of the agency shall consider them in evaluating the offeror's price.

(B) The proposals that the head of an agency is to consider requiring in a solicitation for the award of a production contract are proposals identifying opportunities to ensure that the United States will be able to obtain on a competitive basis items procured in connection with the system that are likely to be reprocured in substantial quantities during the service life of the system. Proposals submitted in response to such requirement may include the following:

(i) Proposals to provide to the United States the right to use technical data to be provided under the contract for competitive reprocurement of the item, together with the cost to the United States, if any, of acquiring such technical data and the right to use such data.

(ii) Proposals for the qualification or development of multiple sources of supply for the item.

(3) If the head of an agency is making a non-competitive award of a development contract or a production contract for a major system, the factors specified in paragraphs (1) and (2) to be considered in evaluating an offer for a contract may be considered as objectives in negotiating the contract to be awarded.

(June 30, 1949, ch. 288, title III, § 303B, as added July 18, 1984, Pub. L. 98-369, div. B, title VII, § 2711(a)(2), 98 Stat. 1179; Oct. 30, 1984, Pub. L. 98-577, title II, § 201(a), 98 Stat. 3068.)

§ 253c. Encouragement of new competition

(a) "Qualification requirement" defined

In this section, "qualification requirement" means a requirement for testing or other quality assurance demonstration that must be completed by an offeror before award of a contract.

(b) Agency head; functions; prior to enforcement of qualification requirement

Except as provided in subsection (c) of this section, the head of the agency shall, before enforcing any qualification requirement—

(1) prepare a written justification stating the necessity for establishing the qualification requirement and specify why the qualification requirement must be demonstrated before contract award;

(2) specify in writing and make available to a potential offeror upon request all requirements which a prospective offeror, or its product, must satisfy in order to become qualified, such requirements to be limited to those least restrictive to meet the purposes necessitating the establishment of the qualification requirement;

(3) specify an estimate of the costs of testing and evaluation likely to be incurred by a potential offeror in order to become qualified;

(4) ensure that a potential offeror is provided, upon request, a prompt opportunity to demonstrate at its own expense (except as provided in subsection (d) of this section) its ability to meet the standards specified for qualification using qualified personnel and facilities of the agency concerned or of another agency obtained through interagency agreement, or under contract, or other methods approved by the agency (including use of approved testing and evaluation services not provided under contract to the agency);

(5) if testing and evaluation services are provided under contract to the agency for the purposes of clause (4), provide to the extent possible that such services be provided by a contractor who is not expected to benefit from an absence of additional qualified sources and who shall be required in such contract to adhere to any restriction on technical data asserted by the potential offeror seeking qualification; and

(6) ensure that a potential offeror seeking qualification is promptly informed as to whether qualification is attained and, in the event qualification is not attained, is promptly furnished specific information why qualification was not attained.

(c) Applicability; waiver authority; referral of offers

(1) Subsection (b) of this section does not apply with respect to a qualification requirement established by statute prior to October 30, 1984.

(2) Except as provided in paragraph (3), if it is unreasonable to specify the standards for qualification which a prospective offeror or its product must satisfy, a determination to that effect shall be submitted to the advocate for competition of the procuring activity responsible for the purchase of the item subject to the qualification requirement. After considering any comments of the advocate for competition reviewing such determination, the head of the procuring activity may waive the requirements of paragraphs

(2) through (5) subsection (b) of this section for up to two years with respect to the item subject to the qualification requirement.

(3) The waiver authority contained in paragraph (2) shall not apply with respect to any qualified products list.

(4) A potential offeror may not be denied the opportunity to submit and have considered an offer for a contract solely because the potential offeror has not been identified as meeting a qualification requirement, if the potential offeror can demonstrate to the satisfaction of the contracting officer that the potential offeror or its product meets the standards established for qualification or can meet such standards before the date specified for award of the contract.

(5) Nothing contained in this subsection requires the referral of an offer to the Small Business Administration pursuant to section 647(b)(7) of title 15 if the basis for the referral is a challenge by the offeror to either the validity of the qualification requirement or the offeror's compliance with such requirement.

(6) The head of an agency need not delay a proposed procurement in order to comply with subsection (b) of this section or in order to provide a potential offeror with an opportunity to demonstrate its ability to meet the standards specified for qualification.

(d) Number; qualified sources or products; fewer than two actual manufacturers; functions of agency head

(1) If the number of qualified sources or qualified products available to compete actively for an anticipated future requirement is fewer than two actual manufacturers or the products of two actual manufacturers, respectively, the head of the agency concerned shall—

(A) periodically publish notice in the Commerce Business Daily soliciting additional sources or products to seek qualification, unless the contracting officer determines that such publication would compromise national security; and

(B) bear the cost of conducting the specified testing and evaluation (excluding the costs associated with producing the item or establishing the production, quality control, or other system to be tested and evaluated) for a small business concern or a product manufactured by a small business concern which has met the standards specified for qualification and which could reasonably be expected to compete for a contract for that requirement, but such costs may be borne only if the head of the agency determines that such additional qualified sources or products are likely to result in cost savings from increased competition for future requirements sufficient to offset (within a reasonable period of time considering the duration and dollar value of anticipated future requirements) the costs incurred by the agency.

(2) The head of an agency shall require a prospective contractor requesting the United States to bear testing and evaluation costs under paragraph (1)(B) to certify as to its status as a small business concern under section 632 of title 15.

(e) Examination; need for qualification requirement

Within seven years after the establishment of a qualification requirement, the need for such qualification requirement shall be examined and the standards of such requirement revalidated in accordance with the requirements of subsection (b) of this section. The preceding sentence does not apply in the case of a qualification requirement for which a waiver is in effect under subsection (c)(2) of this section.

(f) Enforcement determination by agency head

Except in an emergency as determined by the head of the agency, whenever the head of the agency determines not to enforce a qualification requirement for a solicitation, the agency may not thereafter enforce that qualification requirement unless the agency complies with the requirements of subsection (b) of this section.

(June 30, 1949, ch. 288, title III,§ 303C, formerly § 303D, as added Oct. 30, 1984, Pub. L. 98-577, title II, § 202(a), 98 Stat. 3069, and renumbered § 303C, Nov. 8,1985, P. L. 99-145, title XIII, §1304(c)(4)(A), 99 Stat. 742.)

§ 253d. Validation of proprietary data restrictions

(a) Contracts; delivery of technical services; contents

A contract for property or services entered into by an executive agency which provides for the delivery of technical data, shall provide that—

(1) a contractor or subcontractor at any tier shall be prepared to furnish to the contracting officer a written justification for any restriction asserted by the contractor or subcontractor on the right of the United States to use such technical data; and

(2) the contracting officer may review the validity of any restriction asserted by the contractor or by a subcontractor under the contract on the right of the United States to use technical data furnished to the United States under the contract if the contracting officer determines that reasonable grounds exist to question the current validity of the asserted restriction and that the continued adherence to the asserted restriction by the United States would make it impracticable to procure the item competitively at a later time.

(b) Review; challenge; notice

If after such review the contracting officer determines that a challenge to the asserted restriction is warranted, the contracting officer shall provide written notice to the contractor or subcontractor asserting the restriction. Such notice shall state—

(1) the grounds for challenging the asserted restriction; and

(2) the requirement for a response within 60 days justifying the current validity of the asserted restriction

(c) Written request; additional time; schedule of responses

If a contractor or subcontractor asserting a restriction subject to this section submits to the contracting officer a written request, showing the need for additional time to comply with the requirement to justify the current validity of the asserted restriction, additional time to adequately permit the submission of such justification shall be provided by the contracting officer as appropriate. If a party asserting a restriction receives notices of challenges to restrictions on technical data from more than one contracting officer, and notifies each contracting officer of the existence of more than one challenge, the contracting officer initiating the first in time challenge, after consultation with the party asserting the restriction and the other contracting officers, shall formulate a schedule of responses to each of the challenges that will afford the party asserting the restriction with an equitable opportunity to respond to each such challenge.

(d) Decision; validity of asserted restriction; failure to submit response

(1) Upon a failure by the contractor or subcontractor to submit any response under subsection (b) of this section, the contracting officer shall issue a decision pertaining to the validity of the asserted restriction.

(2) If a justification is submitted in response to the notice provided pursuant to subsection (b) of this section, a contracting officer shall within 60 days of receipt of any justification submitted, issue a decision or notify the party asserting the restriction of the time within which a decision will be issued.

(e) Claim; considered claim within Contract Disputes Act of 1978

If a claim pertaining to the validity of the asserted restriction is submitted in writing to a contracting officer by a contractor or subcontractor at any tier, such claim shall be considered a claim within the meaning of the Contract Disputes Act of 1978 (41 U.S.C. 601 et seq.).

(f) Challenge; use of technical data; sustained; liability of United States for costs and fees

(1) If, upon final disposition, the contracting officer's challenge to the restriction on the right of the United States to use such technical data is sustained—

(A) the restriction on the right of the United States to use the technical data shall be cancelled; and

(B) if the asserted restriction is found not to be substantially justified, the contractor or subcontractor, as appropriate, shall be liable to the United States for payment of the cost to the United States of reviewing the asserted restriction and the fees and other expenses (as defined in section 2412(d)(2)(A) of title 28) incurred by the United States in challenging the asserted restriction, unless special circumstances would make such payment unjust.

(2) If, upon final disposition, the contracting officer's challenge to the restriction on the right of the United States to use such technical data is not sustained—

(A) the United States shall continue to be bound by the restriction; and

(B) the United States shall be liable for payment to the party asserting the restriction for fees and other expenses (as defined in section 2412(d)(2)(A) of title 28) incurred by the party asserting the restriction in defending the asserted restriction if the challenge by the United States is found not to be made in good faith.

(June 30, 1949, ch. 288, title III, § 303D, formerly § 303E. as added Oct. 30, 1984, Pub. L. 98-577, title II, § 203(a), 98 Stat. 3071, and renumbered § 303D, Nov. 8, 1985, Pub. L. 95-145, title XIII, § 1304(c)(4)(A), 99 Stat. 742.)

§ 253e. Commercial pricing for supplies

(a) Price to United States

Except in the case of an offer submitted with a written statement under subsection (b)(2) of this section and except as provided in subsection (c) of this section, a contract entered into using other than competitive procedures by an executive agency for the purchase of items that are offered for sale to the public may not result in a price to the United States that exceeds the lowest price at which such items are sold by the contractor to the public.

(b) Certification

A person who submits an offer to an executive agency for the supply of items that it offers for sale to the public (1) shall certify in the offer that the price offered is not more than its lowest commercial price for the items, or (2) shall submit with the offer a written statement specifying the amount of the difference between its lowest commercial price for the items and the price offered, and providing a justification for that difference.

(c) Applicability

Subsections (a) and (b) of this section do not apply to a contract if the contracting officer determines that the use of the price otherwise required by subsection (a) of this section for such contract is not appropriate because of—

(1) national security considerations; or

(2) differences in quantities, quality, delivery, or other terms and conditions of the contract from commercial contract terms.

(June 30, 1949, ch. 288, title III, § 303E, formerly § 303F, as added Oct. 30, 1984, Pub. L. 98-577, title II, § 204(a), 98 Stat. 3072, and renumbered § 303E, Nov. 8, 1985, Pub. L. 99-145, title XIII, § 1304(c)(4)(A), 99 Stat. 742.)

§ 253f. Economic order qualities

(a) Procurement of supplies; costs advantageous to United States

Each executive agency shall procure supplies in such quantity as (A) will result in the total cost and unit cost most advantageous to the United States, where practicable, and (B) does not exceed the quantity reasonably expected to be required by the agency.

(b) Opinions; economic advantage to United States

Each solicitation for a contract for supplies shall, if practicable, include a provision inviting each offeror responding to the solicitation to state an opinion on whether the quantity of the supplies proposed to be procured is economically advantageous to the United States and, if applicable, to recommend a quantity or quantities which would be more economically advantageous to the United States. Each such recommendation shall include a quotation of the total price and the unit price for supplies procured in each recommended quantity.
(June 30, 1949, ch. 288, title III, § 303F, formerly § 303G, as added Oct. 30, 1984, Pub. L. 98-577, title II, § 205(a), 98 Stat. 3073, and renumbered § 303F, Nov. 8, 1985, Pub. L. 99-145, title XIII, § 1304(c)(4)(A), 99 Stat. 742.)

§ 253g. Prohibition of contractors limiting subcontractor sales directly to United States

(a) Contract restrictions

Each contract for the purchase of property or services made by an executive agency shall provide that the contractor will not—

(1) enter into any agreement that has the effect of unreasonably restricting sales by the subcontractor directly to the United States of any item or process (including computer software) made or furnished by the subcontractor under the contract (or any follow-on production contract); or

(2) otherwise act to restrict unreasonably the ability of a subcontractor to make sales to the United States described in clause (1).

(b) Rights under law

This section does not prohibit a contractor from asserting rights it otherwise has under law.
(June 30, 1949, ch. 288, title III, § 303G, formerly § 303H, as added Oct. 30, 1984, Pub. L. 98-577, title II, § 206(a), 98 Stat. 3073, and renumbered § 303G, Nov. 8, 1985, Pub. L. 99-145, title XIII, § 1304(c)(4)(A), 99 Stat. 742.)

§ 254. Contract requirements

(a) Contracts awarded using procedures other than sealed-bid procedures

Except as provided in subsection (b) of this section, contracts awarded after using procedures other than sealed-bid procedures may be of any type which in the opinion of the agency head will promote the best interests of the Government. Every contract awarded after using procedures other than sealed-bid procedures shall contain a suitable warranty, as determined by the agency head, by the contractor that no person or selling agency has been employed or retained to solicit or secure such contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business, for the breach or violation of which warranty the Government shall have the right to annul such contract without liability or in its discretion to deduct from the contract price or consideration the full amount of such commission, percentage, brokerage, or contingent fee.

(b) Barred contracts; fee limitation; determination of use; advance notification

The cost-plus-a-percentage-of-cost system of contracting shall not be used, and in the case of a cost-plus-a-fixed-fee contract the feel shall not exceed 10 per centum of the estimated cost of the contract, exclusive of the fee, as determined by the agency head at the time of entering into such contract (except that a fee not in excess of 15 per centum of such estimated cost is authorized in any such contract for experimental, developmental, or research work and that a fee inclusive of the contractor's costs and not in excess of 6 per centum of the estimated cost, exclusive of fees, as determined by the agency head at the time of entering into the contract, of the project to which such fee is applicable is authorized in contracts for architectural or engineering services relating to any public works or utility project). Neither a cost nor a cost-plus-a-fixed-fee contract nor an incentive-type contract shall be used unless the agency head determines that such method of contracting is likely to be less costly than other methods or that it is impractical to secure property or services of the kind or quality required without the use of a cost or cost-plus-a-fixed-fee contract or an incentive-type contract. All cost and cost-plus-a-fixed-fee contracts shall provide for advance notification by the contractor to the procuring agency of any subcontract thereunder on a cost-plus-a-fixed-fee basis and of any fixed-price subcontract or purchase order which exceeds in dollar amount either $25,000 or 5 per centum of the total estimated cost of the prime contract; and a procuring agency, through any authorized representative thereof, shall have the right to inspect the plans and to audit the books and records of any prime contractor or subcontractor engaged in the performance of a cost or cost-plus-a-fixed-fee contract.

(c) Examination of books, records, etc., of contractors; time limitation; exemptions; exceptional conditions; reports to Congress

All contracts awarded after using procedures other than sealed-bid procedures shall include a clause to the effect that the Comptroller General of the United States or any of his duly authorized representatives shall until the expiration of three years after final payment have access to and the right to examine any directly pertinent books, documents, papers, and records of the contractor or any of his subcontractors engaged in the performance of and involving transactions related to such contracts or subcontracts. Under regulations to be prescribed by the Administrator, however, such clause may be omitted from contracts with foreign contractors or foreign subcontractors if the agency head determines, with the concurrence of the Comptroller General of the United States or his designee, that the omission will serve the best interests of the United States. However, the concurrence of the Comptroller General of the United States or his designee is not required for the omission of such clause—

(1) where the contractor or subcontractor is a foreign government or agency thereof or is precluded by the laws of the country involved from making its books, documents, papers, or records available for examination; and

(2) where the agency head determines, after taking into account the price and availability of the property or services from United States sources, that the public interest would be best served by the omission of the clause.

If the clause is omitted based on a determination under clause (2) a written report shall be furnished to the Congress. The power of the agency head to make the determination specified in the preceding sentences shall not be delegable.

(d) Submission of cost or pricing data by contractors and subcontractors; certificate; adjustment of price; inspection of books, records, etc.; necessity of data; exceptions

(1) A prime contractor or any subcontractor shall be required to submit cost or pricing data under the circumstances listed below, and shall be required to certify that, to the best of such contractor's or subcontractor's knowledge and belief, the cost or pricing data submitted were accurate, complete, and current—

(A) before the award of any prime contract under this subchapter using procedures other than sealed-bid procedures, if the contract price is expected to exceed $100,000;

(B) before the pricing of any contract change or modification, if the price adjustment is expected to exceed $100,000, or such lesser amount as may be prescribed by the agency head;

(C) before the award of a subcontract at any tier, when the prime contractor and each higher tier subcontractor have been required to furnish such a certificate, if the price of such subcontract is expected to exceed $100,000; or

(D) before the pricing of any contract change or modification to a subcontract covered by clause (C), if the price adjustment is expected to exceed $100,000, or such lesser amount as may be prescribed by the agency head.

(2) Any prime contract or change or modification thereto under which a certificate is required under paragraph (1) shall contain a provision that the price to the Government, including profit or fee, shall be adjusted to exclude any significant sums by which it may be determined by the agency head that such price was increased because the contractor or any subcontractor required to furnish such a certificate, furnished cost or pricing data which, as of a date agreed upon between the parties (which date shall be

as close to the date of agreement on the price as is practicable), were inaccurate, incomplete, or noncurrent.

(3) For the purpose of evaluating the accuracy, completeness, and currency of cost or pricing data required to be submitted by this subsection, any authorized representative of the agency who is an employee of the United States Government shall have the right, until the expiration of three years after final payment under the contract or subcontract, to examine all books, records, documents, and other data to the proposal for the contract, the discussions conducted on the proposal, pricing, or performance of the contract or subcontract.

(4) When cost or pricing data are not required to be submitted by this subsection, such data may nevertheless be required by the agency if the agency head determines that such data are necessary for the evaluation by the executive agency of the reasonableness of the price of the contract or subcontract.

(5) The requirements of this subsection need not be applied to contracts or subcontracts—

(A) where the price is based on—

(i) adequate price competition,

(ii) established catalog or market prices of commercial items sold in substantial quantities to the general public, or

(iii) prices set by law or regulation, or

(B) in exceptional cases, where the agency head determines that the requirements of this subsection may be waived and states in writing the reasons for such determination.

(June 30, 1949, ch. 288, title III, § 304, 63 Stat. 395; Oct. 31, 1951, ch. 652, 65 Stat. 700; July 12, 1952, ch. 703, § 1(m), 66 Stat. 594; Sept. 27, 1966, Pub. L. 89-607, § 2, 80 Stat. 850; July 18, 1984, Pub. L. 98-369, div. B, title VII, §§ 2712, 2714(a)(3), 98 Stat. 1181, 1184.)

§ 254a. Cost-type research and development contracts with educational institutions

On and after September 5, 1962, provision may be made in cost-type research and development contracts (including grants) with universities, colleges, or other educational institutions for payment of reimbursable indirect costs on the basis of predetermined fixed-percentage rates applied to the total, or an element thereof, of the reimbursable direct costs incurred. (Pub. L. 87-638, Sept. 5, 1962, 76 Stat. 437.)

§ 255. Advance or other payments

(a) Conditions

Any executive agency may—

(1) make advance, partial, progress or other payments under contracts for property or services made by the agency; and

(2) insert in bid solicitations for procurement of property or services a provision limiting to small business concerns advance or progress payments.

(b) Amount

Payments made under subsection (a) of this section may not exceed the unpaid contract price.

(c) Security

Advance payments under subsection (a) of this section may be made only upon adequate security and a determination by the agency head that to do so would be in the public interest. Such security may be in the form of a lien in favor of the Government on the property contracted for, on the balance in an account in which such payments are deposited, and on such of the property acquired for performance of the contract as the parties may agree. This lien shall be paramount to all other liens.
(June 30, 1949, ch. 288, title III, § 305, 63 Stat. 396; July 12, 1952, ch. 703, § 1(m), 66 Stat. 594; Aug. 28, 1958, Pub. L. 85-800, § 4, 72 Stat. 966.)

§ 256a. Waiver of liquidated damages

Whenever any contract made on behalf of the Government by the head of any Federal Agency, or by officers authorized by him so to do, includes a provision for liquidated damages for delay, the Comptroller General upon recommendation of such head is authorized and empowered to remit the whole or any part of such damages as in his discretion may be just and equitable.
(Sept. 5, 1950, ch. 849, § 10(a), 64 Stat. 591.)

§ 257. Administrative determinations

(a) Conclusiveness; delegation of powers

Determinations and decisions provided in this Act to be made by the Administrator or other agency head shall be final. Such determinations or decisions may be made with respect to individual purchases or contracts or, except for determinations or decisions under sections 253, 253a, and 253b of this title, with respect to classes of purchases or contracts. Except as provided in section 253(d)(2) of this title, and except as provided in section 486(d) of title 40 with respect to the Administrator, the agency head is authorized to delegate his powers provided by this Act, including the making of such determinations and decisions, in his discretion and subject to his direction, to any other officer or officers or officials of the agency.

(b) Basis of determinations; finding conclusive; preservation of findings; copy

Each determination or decision required by section 254 or by section 255(c) of this title shall be based upon written findings made by the official making such determination, which findings shall be final and shall be available within the agency for a period of at least six years following the date of the determination. A copy of the findings shall be submitted to the General Accounting Office with the contract.

(June 30, 1949, ch. 288, title III, § 307, 63 Stat. 396; Aug. 28, 1958, Pub. L. 85-800, § 5, 72 Stat. 967; Nov. 8, 1965, Pub. L. 89-343, §§ 3, 4, 79 Stat. 1303; July 18, 1984, Pub. L. 98-369, div. B, title VII, § 2714(a)(4), 98 Stat. 1184.)

§ 258. Laws applicable to contracts

No purchase or contract shall be exempt from the Act of June 30, 1936 (49 Stat. 2036, as amended; 41 U.S.C. 35 to 45), or from the Act of March 3, 1931 (46 Stat. 1494, as amended; 40 U.S.C. 276a to 276a-6), solely by reason of having been made or awarded after using procedures other than sealed-bid procedures and the provisions of said Acts and of the Act of June 19, 1912 (37 Stat. 137, as amended; 40 U.S.C. 324 and 325a), if otherwise applicable, shall apply to such purchases and contracts.
(June 30, 1949, ch. 288, title III, § 308, 63 Stat. 397; July 18, 1984, Pub. L. 98-369, div. B, title VII, § 2714(a)(5), 98 Stat. 1185.)

§ 259. Definitions

As used in this subchapter—

(a) The term "agency head" shall mean the head or any assistant head of any executive agency, and may at the option of the Administrator include the chief official of any principal organizational unit of the General Services Administration.

(b) The term "competitive procedures" means procedures under which an executive agency enters into a contract pursuant to full and open competition. Such term also includes—

(1) procurement of architectural or engineering services conducted in accordance with title IX of this Act (40 U.S.C. 541 et seq.);

(2) the competitive selection of basic research proposals resulting from a general solicitation and the peer review or scientific review (as appropriate) of such proposals;

(3) the procedures established by the Administrator for the multiple awards schedule program of the General Services Administration if—

(A) participation in the program has been open to all responsible sources; and

(B) orders and contracts under such procedures result in the lowest overall cost alternative to meet the needs of the Government;

(4) procurements conducted in furtherance of section 644 of title 15 as long as all responsible business concerns that are entitled to submit offers for such procurements are permitted to compete; and

(5) a competitive selection of research proposals resulting from a general solicitation and peer review or scientific review (as appropriate) solicited pursuant to section 638 of title 15.

(c) The terms "full and open competition", "responsible source", "technical data", "major system", "item", "item of supply', and "supplies" have the same meanings provided such terms in section 403 of this title.

(June 30, 1949, ch. 288, title III, § 309, 63 Stat. 397; July 12, 1952, ch. 703, §1(h), 66 State, 593; July 18, 1984, Pub. L. 98-369, div. B, title VII, § 2711(a)(3), 98 Stat. 1180; Oct. 30, 1984, Publ. L. 98-577, title V, § 504(a)(3), (4), 98 Stat. 3086.)

§ 260. Laws not applicable to contracts

Sections 5, 8, and 13 of this title shall not apply to the procurement of property or services made by an executive agency pursuant to this subchapter. Any provision of law which authorizes an executive agency (other than an executive agency which is exempted from the provisions of this subchapter by section 252(a) of this title), to procure any property or services without advertising or without regard to said section 5 of this title shall be construed to authorize the procurement of such property or services pursuant to the provisions of this subchapter relating to procedures other than sealed-bid procedures.
(June 30, 1949, ch. 288, title III, § 310, 63 Stat. 397; July 12, 1952, ch. 703, § 1(m), (n), 66 Stat. 594; Aug. 28, 1958, Pub. L. 85-800, § 6, 72 Stat. 967; Nov. 8, 1965, Pub. L. 89-343, § 5, 79 Stat. 1303; July 18, 1984, Pub. L. 98-369, div. B, title VII, § 2714(a)(6), 98 Stat. 1185.)

CHAPTER 5—JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS

§ 321. Limitation on pleading contract provisions relating to finality; standards of review

No provisions of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.
(May 11, 1954, ch. 199, § 1, 68 Stat. 81.)

§ 322. Contract provisions making decisions final on questions of law

No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board.
(May 11, 1954, ch. 199, § 2, 68 Stat. 81.)

EXPLANATORY NOTE

Popular Name. The Act of May 11, 1954, 68 Stat. 81, from which sections 321 and 322 of title 41 derive, is sometimes referred to as the "Wunderlich Act."

CHAPTER 6—SERVICE CONTRACT LABOR STANDARDS

§ 351. Required contract provisions; minimum wages

(a) Every contract (and any bid specification therefor) entered into by the United States or the District of Columbia in excess of $2,500, except as provided in section 356 of this title, whether negotiated or advertised, the principal purpose of which is to furnish services in the United States through the use of service employees, shall contain the following:

(1) A provision specifying the minimum monetary wages to be paid the various classes of service employees in the peformance of the contract or any subcontract thereunder, as determined by the Secretary, or his authorized representative, in accordance with prevailing rates for such employees in the locality, or, where a collective-bargaining agreement covers any such service employees, in accordance with the rates for such employees provided for in such agreement, including prospective wage increases provided for in such agreement as a result of arm's length negotiations. In no case shall such wages be lower than the minimum specified in subsection (b) of this section.

(2) A provision specifying the fringe benefits to be furnished in the various classes of service employees, engaged in the performance of the contract or any subcontract thereunder, as determined by the Secretary or his authorized representative to be prevailing for such employees in the locality, or, where a collective-bargaining agreement covers any such service employees, to be provided for in such agreement, including prospective fringe benefits increases provided for in such agreement as a result of arm's-length negotiations. Such fringe benefits shall include medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, unemployment benefits, life insurance, disability and sickness insurance, accident insurance, vacation and holiday pay, costs of apprenticeship or other similar programs and other bona fide fringe benefits not otherwise required by Federal, State, or local law to be provided by the contractor or subcontractor. The obligation under this subparagraph may be discharged by furnishing any equivalent combinations of fringe benefits or by making equivalent or differential payments in cash under rules and regulations established by the Secretary.

(3) A provision that no part of the services covered by this chapter will be performed in buildings or surroundings or under working conditions, provided by or under the control or supervision of the contractor or any subcontractor, which are unsanitary or hazardous or dangerous to the health or safety of service employees engaged to furnish the services.

(4) A provision that on the date a service employee commences work on a contract to which this chapter applies, the contractor or subcontractor will deliver to the employee a notice of the compensation required under paragraphs (1) and (2) of this subsection, on a form prepared by the Federal agency, or will post a notice of the required compensation in a prominent place at the worksite.

(5) A statement of the rates that would be paid by the Federal agency to the various classes of service employees if section 5341 or section 5332 of title 5 were applicable to them. The Secretary shall give due consideration to such rates in making the wage and fringe benefit determinations specified in this section.

(b)(1) No contractor who enters into any contract with the Federal Government the principal purpose of which is to furnish services through the use of service employees and no subcontractor thereunder shall pay any of his employees engaged in performing work on such contracts less than the minimum wage specified under section 206(a)(1) of title 29.

(2) The provisions of sections 352 to 354 of this title shall be applicable to violations of this subsection.

(Pub. L. 89-286, § 2, Oct. 22, 1965, 79 Stat. 1034; Pub. L. 92-473, §§ 1, 2, Oct. 9, 1972, 86 Stat. 789; Pub. L. 94-489, §§ 1, 2, Oct. 13, 1976, 90 Stat. 2358.)

EXPLANATORY NOTE

Short Title. Section 1 of Public Law 89-286, 79 Stat. 1034, provided that the Act, from which sections 351 to 358 of title 41 derive, may be cited as the "Service Contract Act of 1965."

§ 352. Violations

(a) Liability of responsible party; withholding payments due on contract; payment of underpaid employees from withheld payments

Any violation of any of the contract stipulations required by section 351(a)(1) or (2) or of section 351(b) of this title shall render the party responsible therefor liable for a sum equal to the amount of any deductions, rebates, refunds, or underpayment of compensation due to any employee engaged in the performance of such contract. So much of the accrued payment due on the contract or any other contract between the same contractor and the Federal Government may be withheld as is necessary to pay such employees. Such withheld sums shall be held in a deposit fund. On order of the Secretary, any compensation which the head of the Federal agency or the Secretary has found to be due pursuant to this chapter shall be paid directly to the underpaid employees from any accrued payments withheld under this chapter.

(b) Enforcement of section

In accordance with regulations prescribed pursuant to section 353 of this title, the Federal agency head or the Secretary is hereby authorized to carry out the provisions of this section.

(c) Cancellation of contract; contracts for completion of original contract; liability of original contractor for additional cost

In addition, when a violation is found of any contract stipulation, the contract is subject upon written notice to cancellation by the contracting agency. Whereupon, the United States may enter into other contracts or arrangements for the completion of the original contract, charging any additional cost to the original contractor.

(Pub. L. 89-286, § 3, Oct. 22, 1965, 79 Stat. 1035.)

§ 353. Law governing authority of Secretary

(a) Enforcement of chapter

Sections 38 and 39 of this title shall govern the Secretary's authority to enforce this chapter, make rules, regulations, issue orders, hold hearings, and make decisions based upon findings of fact, and take other appropriate action hereunder.

(b) Limitations and regulations allowing variations, tolerances, and exemptions

The Secretary may provide such reasonable limitations and may make such rules and regulations allowing reasonable variation, tolerances, and exceptions to and from any or all provisions of this chapter (other than section 358 of this title), but only in special circumstances where he determines that such limitation, variation, tolerance, or exemption is necessary and proper in the public interest or to avoid the serious impairment of government business, and is in accord with the remedial purpose of this chapter to protect prevailing labor standards.

(c) Predecessor contracts; employees' wages and fringe benefits

No contractor or subcontractor under a contract, which succeeds a contract subject to this chapter and under which substantially the same services are furnished, shall pay any service employee under such contract less than the wages and fringe benefits, including accrued wages and fringe benefits, and any prospective increases in wages and fringe benefits provided for in a collective-bargaining agreement as a result of arm's-length negotiations, to which such service employees would have been entitled if they were employed under the predecessor contract: *Provided,* That in any of the forgoing circumstances such obligations shall not apply if the Secretary finds after a hearing in accordance with regulations adopted by the Secretary that such wages and fringe benefits are substantially at variance with those which prevail for services of a character similar in the locality.

(d) Duration of contract

Subject to limitations in annual appropriation Acts but notwithstanding any other provision of law, contracts to which this chapter applies may, if authorized by the Secretary, be for any term of years not exceeding five, if each such contract provides for the periodic adjustment of wages and fringe benefits pursuant to future determinations, issued in the manner prescribed in section 351 of this title no less often than once every two years during the term of the contract, covering the various classes of service employees.

(Pub. L. 89-286, § 4, Oct. 22, 1965, 79 Stat. 1035; Pub. L. 92-473, § 3, Oct. 9,1972, 86 Stat. 789.)

§ 354. List of violators; prohibition of contract award to firms appearing on list; actions to recover underpayments; payment of sums recovered

(a) The Comptroller General is directed to distribute a list to all agencies of the Government giving the names of persons or firms that the Federal agencies or the Secretary have found to have violated this chapter. Unless the Secretary otherwise recommends because of unusual circumstances, no contract of the United States shall be awarded to the persons or firms appearing on this list or to any firm, corporation, partnership, or association in which such persons or firms have a substantial interest until three years have elapsed from the date of publication of the list containing the name of such persons or firms. Where the Secretary does not otherwise recommend because of unusual circumstances, he shall, not later than ninety days after a hearing examiner has made a finding of a violation of this chapter, forward to the Comptroller General the name of the individual or firm found to have violated the provisions of this chapter.

(b) If the accrued payments withheld under the terms of the contract are insufficient to reimburse all service employees with respect to whom there has been a failure to pay the compensation required pursuant to this chapter, the United States may bring action against the contractor, subcontractor, or any sureties in any court of competent jurisdiction to recover the remaining amount of underpayments. Any sums thus recovered by the United States shall be held in the deposit fund and shall be paid, on order of the Secretary, directly to the underpaid employee or employees. Any sum not paid to an employee because of inability to do so within three years shall be covered into the Treasury of the United States as miscellaneous receipts. (Pub. L. 89-286, § 5, Oct. 22, 1965, 79 Stat. 1035; Pub. L. 92-473,§ 4, Oct. 1973, 86 Stat. 790.)

§ 355. Exclusion of fringe benefit payments in determining overtime pay

In determining any overtime pay to which such service employees are entitled under any Federal law, the regular or basic hourly rate of pay of such an employee shall not include any fringe benefit payments computed hereunder which are excluded from the regular rate under the Fair Labor Standards Act [29 U.S.C. 201 et seq.] by provisions of section 7(d) thereof [29 U.S.C. 207(d)].
(Pub.. L. 89–286, § 6, Oct. 22, 1965, 79 Stat. 1035.)

§ 356. Exemptions

This chapter shall not apply to—

(1) any contract of the United States or District of Columbia for construction, alteration and/or repair, including painting and decorating of public buildings or public works;

(2) any work required to be done in accordance with the provisions of the Walsh-Healey Public Contracts Act [41 U.S.C. 35 et seq.];

(3) any contract for the carriage of freight or personnel by vessel, airplane, bus, truck, express, railway line or oil or gas pipeline where published tariff rates are in effect;

(4) any contract for the furnishing of services by radio, telephone, telegraph, or cable companies, subject to the Communications Act of 1934 [47 U.S.C. 151 et seq.];

(5) any contract for public utility services, including electric light and power, water, steam, and gas;

(6) any employment contract providing for direct services to a Federal agency by an individual or individuals; and

(7) any contract with the United States Postal Service, the principal purpose of which is the operation of postal contract stations.

(Pub. L. 89-286, § 7, Oct. 22, 1965, 79 Stat. 1035; Pub. L. 91-375, §§ 4(a), 6(o), Aug. 12, 1970, 84 Stat. 773, 783.)

§ 357. Definitions

For the purposes of this chapter—

(a) "Secretary" means Secretary of Labor.

(b) The term "service employee" means any person engaged in the performance of a contract entered into by the United States and not exempted under section 356 of this title, whether negotiated or advertised, the principal purpose of which is to furnish services in the United States (other than any person employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in part 541 of title 29, Code of Federal Regulations, as of July 30, 1976, and any subsequent revision of those regulations); and shall include all such persons regardless of any contractual relationship that may be alleged to exist between a contractor or subcontractor and such persons.

(c) The term "compensation" means any of the payments or fringe benefits described in section 351 of this title.

(d) The term "United States" when used in a geographical sense shall include any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, Outer Continental Shelf lands as defined in the Outer Continental Shelf Lands Act, American Samoa, Guam, Wake Island, Eniwetok Atoll, Kwajalein Atoll, Johnston Island, and Canton Island, but shall not include any other territory under the jurisdiction of the United States or any United States base or possession within a foreign country.

(Pub. L. 89-286, § 8, Oct. 22, 1965, 79 Stat. 1036; Pub. L. 93-57, § 1, July 6, 1973, 87 Stat. 140; Pub. L. 94-489, § 3, Oct. 13, 1976, 90 Stat. 2358.)

§ 358. Wage and fringe benefit determinations of Secretary.

It is the intent of the Congress that determinations of minimum monetary wages and fringe benefits for the various classes of service employees under the provisions of paragraphs (1) and (2) of section 351(a) of this title should be made with respect to all contracts subject to this chapter, as soon as it is administratively feasible to do so. In any event, the Secretary shall make such determinations with respect to at least the following contracts subject to this chapter which are entered into during the applicable fiscal year:

(1) For the fiscal years ending June 30, 1973, all contracts under which more than twenty-five service employees are to be employed.

(2) For the fiscal year ending June 30, 1974, all contracts, under which more than twenty service employees are to be employed.

(3) For the fiscal year ending June 30, 1975, all contracts under which more than fifteen service employees are to be employed.

(4) For the fiscal year ending June 30, 1976, all contracts under which more than ten service employees are to be employed.

(5) On or after July 1, 1976, all contracts under which more than five service employees are to be employed.

(Pub. L. 89–286, § 10, as added Pub. L. 92–473, § 5, Oct. 9, 1972, 86 Stat. 790, and amended Pub. L. 94–273, § 29, Apr. 21, 1976, 90 Stat. 380.)

CHAPTER 7—OFFICE OF FEDERAL PROCUREMENT POLICY

* * * * *

§ 404. Establishment of Office of Federal Procurement Policy; appointment of Administrator

(a) There is established in the Office of Management and Budget an office to be known as the Office of Federal Procurement Policy (hereinafter referred to as the "Office").

(b) There shall be at the head of the Office an Administrator for Federal Procurement Policy (hereinafter referred to as the "Administrator"), who shall be appointed by the President, by and with the advice and consent of the Senate.

(Pub. L. 93–400, § 5, Aug. 30, 1974, 88 Stat. 797.)

§ 405. Authority and functions of the Administrator

(a) Development of procurement policy; leadership

The Administrator shall provide overall direction of procurement policy and leadership in the development of procurement systems of the executive agencies. To the extent that the Administrator considers appropriate, in carrying out the policies and functions set forth in this chapter, and with due regard for applicable laws and the program activities of the executive agencies, the Administrator may prescribe Government-wide procurement policies which shall be implemented in the single system of Government-wide procurement regulations and shall be followed by executive agencies in the procurement of—

(1) property other than real property in being;

(2) services, including research and development; and

(3) construction, alteration, repair, or maintenance of real property.

(b) Government-wide procurement regulations

In any instance in which the Administrator determines that the Department of Defense, the National Aeronautics and Space Administration, and the General Services Administration are unable to agree on or fail to issue Government-wide regulations, procedures and forms in a timely manner, the Administrator may, with due regard for applicable laws and the program activities of the executive agencies and consistent with the policies and functions set forth in this chapter, prescribe Government-wide regulations, procedures and forms which shall be followed by executive agencies in the procurement of—

(1) property other than real property in being;

(2) services, including research and development; and

(3) construction, alteration, repair, or maintenance of real property.

(c) Noninterference with executive agencies

The authority of the Administrator under this chapter shall not be construed to—

(1) impair or interfere with the determination by executive agencies of their need for, or their use of, specific property, services, or construction, including particular specifications therefor; or

(2) interfere with the determination by executive agencies of specific actions in the award or administration of procurement contracts.

(d) Enumeration of included functions

The functions of the Administrator shall include—

(1) providing leadership and ensuring action by the executive agencies in the establishment, development and maintenance of the single system of simplified Government-wide procurement regulations and resolving differences among the executive agencies in the development of simplified Government-wide procurement regulations, procedures and forms;

(2) coordinating the development of Government-wide procurement system standards that shall be implemented by the executive agencies in their procurement systems;

(3) providing leadership and coordination in the formulation of the executive branch position on legislation relating to procurement;

(4) providing for a computer-based Federal Procurement Data System which shall be located in the General Services Administration (acting as executive agent for the Administrator) and shall collect, develop, and disseminate procurement data;

(5) providing for a Federal Acquisition Institute which shall be located in the General Services Administration (acting as executive agent for the Administrator) and shall—

(A) foster and promote Government-wide career management programs for a professional procurement work force; and

(B) promote and coordinate Government-wide research and studies to improve the procurement process and the laws, policies, methods, regulations, procedures, and forms relating to procurement by the executive agencies;

(6) establishing criteria and procedures to ensure the effective and timely solicitation of the viewpoints of interested parties in the development of procurement policies, regulations, procedures, and forms;

(7) developing standard contract forms and contract language in order to reduce the Government's cost of procuring property and services and the private sector's cost of doing business with the Government; and

(8) completing action, as appropriate, on the recommendations of the Commission on Government Procurement.

(e) Consultation; assistance of existing executive agencies; advisory committees and interagency groups

In carrying out the functions set forth in subsection (d) of this section, the Administrator—

(1) shall consult with the affected executive agencies, including the Small Business Administration;

(2) may, with the concurrence of the heads of affected executive agencies, designate an executive agency or executive agencies to assist in the performance of such functions; and

(3) may establish advisory committees or other interagency groups to assist in providing for the establishment, development, and maintenance of a single system of simplified Government-wide procurement regulations and to assist in the performance of any of the other functions which the Administrator considers appropriate.

(f) Oversight of regulations promulgated by other agencies relating to procurement

The Director of the Office of Management and Budget may deny the promulgation of or rescind any Government-wide regulation or final rule or regulation of any executive agency relating to procurement if the Administrator determines that such rule or regulation is inconsistent with the policies set forth in section 401 of this title or any policies, regulations, or procedures issued pursuant to subsection (a) of this section.

(g) Assignment, delegation, or transfer of functions prohibited

Except as otherwise provided by law, no duties, functions, or responsibilities, other than those expressly assigned by this chapter, shall be assigned, delegated, or transferred to the Administrator.

(h) Automatic data processing and telecommunications equipment; real property procurement; Office of Management and Budget

Nothing in this chapter shall be construed to—

(1) impair or affect the authorities or responsibilities conferred by the Federal Property and Administrative Services Act of 1949 [41 U.S.C. 251 et seq.] with respect to the procurement of automatic data processing and telecommunications equipment and services or of real property; or

(2) limit the current authorities and responsibilities of the Director of the Office of Management and Budget.

(i) Recipients of Federal grants or assistance

(1) With due regard to applicable laws and the program activities of the executive agencies administering Federal programs of grants or assistance,

the Administrator may prescribe Government-wide policies, regulations, procedures, and forms which the Administrator considers appropriate and which shall be followed by such executive agencies in providing for the procurement, to the extent required under such programs, of property or services referred to in clauses (1), (2), and (3) of subsection (a) of this section by recipients of Federal grants or assistance under such programs.

(2) Nothing in paragraph (1) shall be construed to—

(A) permit the Administrator to authorize procurement or supply support, either directly or indirectly, to recipients of Federal grants or assistance; or

(B) authorize any action by such recipients contrary to State and local laws, in the case of programs to provide Federal grants or assistance to States and political subdivisions.

(Pub. L. 93–400, § 6, Aug. 30, 1974, 88 Stat. 797; Pub. L. 96–83, § 4, Oct. 10, 1979, 93 Stat. 649; Pub. L. 98–191, § 5, Dec. 1, 1983, 97 Sat. 1326; Pub. L. 98–369, div. B, title VII, § 2732(b)(1), July 18, 1984, 98 Stat. 1199.)

* * * * *

§ 406. Administrative powers

Upon the request of the Administrator, each executive agency is directed to—

(1) make its services, personnel, and facilities available to the Office to the greatest practicable extent for the performance of functions under this chapter; and

(2) except when prohibited by law, furnish to the Administrator and give him access to all information and records in its possession which the Administrator may determine to be necessary for the performance of the functions of the Office.

(Pub. L. 93–400, § 7, Aug. 30, 1974, 88 Stat. 798.)

* * * * *

§ 408. Applicability of existing laws

The authority of an executive agency under any other law to prescribe policies, regulations, procedures, and forms for procurement is subject to the authority conferred in section 405 of this title.

(Pub. L. 93–400, § 9, Aug. 30, 1974, 88 Stat 799.)

* * * * *

§ 414. Executive agency responsibilities

To further achieve effective, efficient, and economic administration of the Federal procurement system, the head of each executive agency shall, in accordance with applicable laws, Government-wide policies and regulations, and good business practices—

(1) increase the use of full and open competition in the procurement of property or services by the executive agency by establishing policies, procedures, and practices that assure that the executive agency receives a sufficient number of sealed bids or competitive proposals from responsible sources to fulfill the Government's requirements (including performance and delivery schedules) at the lowest reasonable cost considering the nature of the property or service procured;

(2) establish clear lines of authority, accountability, and responsibility for procurement decisionmaking within the executive agency, including placing the procurement function at a sufficiently high level in the executive agency to provide—

(A) direct access to the head of the major organizational element of the executive agency served; and

(B) comparative equality with organizational counterparts;

(3) designate a senior procurement executive who shall be responsible for management direction of the procurement system of the executive agency, including implementation of the unique procurement policies, regulations, an standards of the executive agency; and

(4) develop and maintain a procurement career management program in the executive agency to assure an adequate professional work force.

(Pub. L. 93-400, § 16, as added Pub. L. 98-191, § 7, Dec. 1, 1983, 97 Stat. 1330, and amended Pub. L. 98-369, div. B, title VII, § 2732(b)(2), July 18, 1984, 98 Stat. 1199.)

§ 414a. Personnel evaluation

The head of each executive agency that is subject to the provisions of title III of the Federal Property and Administrative Services Act of 1949 [41 U.S.C. 251 et seq.] shall ensure, with respect to the employees of that agency whose primary duties and responsibilities pertain to the award of contracts subject to the provisions of this Act, that the performance appraisal system applicable to such employees affords appropriate recognition to, among other factors, efforts—

(1) to increase competition and achieve cost savings through the elimination of procedures that unnecessarily inhibit full and open competition;

(2) to further the purposes of the Small Business and Federal Procurement Competition Enhancement Act of 1984 and the Defense Procurement Reform Act of 1984; and

(3) to further such other objectives and purposes of the Federal acquisition system as may be authorized by law.

(Pub. L. 98-577, title V, § 502, Oct. 30, 1984, 98 Stat. 3085.)

* * * * *

§ 416. Procurement notice

(a) Covered executive agency activities; publication of notice; time limitations

(1) Except as provided in subsection (c) of this section—

(A) an executive agency intending to—

(i) solicit bids or proposals for a contract for property or services for a price expected to exceed $10,000; or

(ii) place an order, expected to exceed $10,000, under a basic agreement, basic ordering agreement, or similar arrangement,

shall furnish for publication by the Secretary of Commerce a notice described in subsection (b) of this section; and

(B) an executive agency awarding a contract for property or services for a price exceeding $25,000, or placing an order referred to in clause (A)(ii) exceeding $25,000, shall furnish for publication by the Secretary of Commerce a notice announcing the award or order if there is likely to be any subcontract under such contract or order.

(2) The Secretary of Commerce shall publish promptly in the Commerce Business Daily each notice required by paragraph (1).

(3) Whenever an executive agency is required by paragraph (1)(A) to furnish a notice to the Secretary of Commerce, such executive agency may not—

(A) issue the solicitation earlier than 15 days after the date on which the notice is published by the Secretary of Commerce; or

(B) establish a deadline for the submission of all bids or proposals in response to the notice required by paragraph (1)(A) that—

(i) in the case of an order under a basic agreement, basic ordering agreement, or similar arrangement, is earlier than the date 30 days after the date the notice required by paragraph (1)(A)(ii) is published;

(ii) in the case of a solicitation for research and development, is earlier than the date 45 days after the date the notice required by paragraph (1)(A)(i) is published; or

(iii) in any other case, is earlier than the date 30 days after the date the solicitation is issued.

(b) Contents of notice

Each notice of solicitation required by subsection (a)(1)(A) shall include—

(1) an accurate description of the property or services to be contracted for, which description (A) shall not be unnecessarily restrictive of competition, and (B) shall include, as appropriate, the agency nomenclature, National Stock Number or other part number, and a brief description of the item's form, fit, or function, physical dimensions, predominant material of manufacture, or similar information that will assist a prospective contractor to make an informed business judgment as to whether a copy of the solicitation should be requested;

(2) provisions that—

(A) state whether the technical data required to respond to the solicitation will not be furnished as part of such solicitation, and identify the source in the Government, if any, from which the technical data may be obtained; and

(B) state whether an offeror, its product, or service must meet a qualification requirement in order to be eligible for award, and, if so, identify the office from which the qualification requirement may be obtained;

(3) the name, business address, and telephone number of the contracting officer;

(4) a statement that all responsible sources may submit a bid, proposal or quotation (as appropriate) which shall be considered by the agency; and

(5) in the case of a procurement using procedures other than competitive procedures, a statement of the reason justifying the use of such procedures and the identity of the intended source.

(c) Exempted, etc., activities of executive agency

(1) A notice is not required under subsection (a)(1) of this section if—

(A) the notice would disclose the executive agency's needs and the disclosure of such needs would compromise the national security;

(B) the proposed procurement would result from acceptance of—

(i) any unsolicited proposal that demonstrates a unique and innovative research concept and the publication of any notice of such unsolicited research proposal would disclose the originality of thought or innovativeness of the proposal or would disclose proprietary information associated with the proposal; or

(ii) a proposal submitted under section 638 of title 15;

(C) the procurement is made against an order placed under a requirements contract;

(D) the procurement is made for perishable subsistence supplies; or

(E) the procurement is for utility services, other than telecommunication services, and only one source is available.

(2) The requirements of subsection (a)(1)(A) of this section do not apply to any procurement under conditions described in paragraph (2), (3), (4), (5), or (7) of section 253(c) of this title or paragraph (2), (3), (4), (5), or (7) of section 2304(c) of title 10.

(3) The requirements of subsection (a)(1)(A) of this section shall not apply in the case of any procurement for which the head of the executive agency makes a determination in writing, after consultation with the Administrator for Federal Procurement Policy and the Administrator of the Small Business Administration, that it is not appropriate or reasonable to publish a notice before issuing a solicitation.

(d) Availability of complete solicitation package; payment of fee

An executive agency shall make available to any business concern, or the authorized representative of such concern, the complete solicitation package for any on-going procurement announced pursuant to a notice under this section. An executive agency may require the payment of a fee, not exceeding the actual cost of duplication, for a copy of such package.

(Pub. L. 93-400, § 18, as added Pub. L. 98-369, div. B, title VII, § 2732(a), July 18, 1984, 98 Stat. 1196, and amended Pub. L. 98-577, title III, § 303(a), Oct. 30, 1984, 98 Stat. 3077.)

§ 417. Record requirements

(a) Establishment and maintenance of computer file by executive agency; time period coverage

Each executive agency shall establish and maintain for a period of five years a computer file, by fiscal year, containing unclassified records of all procurements, other than small purchases, in such fiscal year.

(b) Contents

The record established under subsection (a) of this section shall include—

(1) with respect to each procurement carried out using competitive procedures—

(A) the date of contract award;

(B) information identifying the source to whom the contract was awarded;

(C) the property or services obtained by the Government under the procurement; and

(D) the total cost of the procurement;

(2) with respect to each procurement carried out using procedures other than competitive procedures—

(A) the information described in clauses (1)(A), (1)(B), (1)(C), and (1)(D);

(B) the reason under section 253(c) of this title or section 2304(c) of title 10, as the case may be, for the use of such procedures; and

(C) the identity of the organization or activity which conducted the procurement.

(c) Record categories

The information that is included in such record pursuant to subsection (b)(1) of this section and relates to procurements resulting in the submission of a bid or proposal by only one responsible source shall be separately categorized from the information relating to other procurements included in such record. The record of such information shall be designated "noncompetitive procurements using competitive procedures".

(d) Transmission and data system entry of information

The information included in the record established and maintained under subsection (a) of this section shall be transmitted to the General Services Administration and shall be entered in the Federal Procurement Data System referred to in section 405(d)(4) of this section.

(Pub. L. 93-400, § 19, as added Pub. L. 98-369, div. B, title VII, § 2732(a), July 18, 1984, 98 Stat. 1197.)

§ 418. Advocates for competition

(a) Establishment, designation, etc., in executive agency

(1) There is established in each executive agency an advocate for competition.

(2) The head of each executive agency shall—

(A) designate for the executive agency and for each procuring activity of the executive agency one officer or employee serving in a position authorized for such executive agency on July 18, 1984 (other than the senior procurement executive designated pursuant to section 414(3) of this title) to serve as the advocate for competition;

(B) not assign such officers or employees any duties or responsibilities that are inconsistent with the duties and responsibilities of the advocates for competition; and

(C) provide such officers or employees with such staff or assistance as may be necessary to carry out the duties and responsibilities of the advocate for competition, such as persons who are specialists in engineering, technical operations, contract administration, financial management, supply management, and utilization of small and disadvantaged business concerns.

(b) Duties and functions

The advocate for competition of an executive agency shall—

(1) be responsible for challenging barriers to and promoting full and open competition in the procurement of property and services by the executive agency;

(2) review the procurement activities of the executive agency;

(3) identify and report to the senior procurement executive of the executive agency designated pursuant to section 414(3) of this title—

(A) opportunities and actions taken to achieve full and open competition in the procurement activities of the executive agency; and

(B) any condition or action which has the effect of unnecessarily restricting competition in the procurement actions of the executive agency; and

(4) prepare and transmit to such senior procurement executive an annual report describing—

(A) such advocate's activities under this section;

(B) new initiatives required to increase competition; and

(C) barriers to full and open competition that remain;

(5) recommend to the senior procurement executive of the executive agency goals and the plans for increasing competition on a fiscal year basis;

(6) recommend to the senior procurement executive of the executive agency a system of personal and organizational accountability for competition, which may include the use of recognition and awards to motivate program managers, contracting officers, and others in authority to promote competition in procurement programs; and

(7) describe other ways in which the executive agency has emphasized competition in programs for procurement training and research.

(c) Responsibilities

The advocate for competition for each procuring activity shall be responsible for challenging barriers to and promoting full and open com-

petition in the procuring activity, including unneccessarily detailed specifications and unnecessarily restrictive statements of need.
(Pub. L. 93-400, § 20, as added Pub. L. 98-369, div. B, title VII, § 2732(a), July 18, 1984, 98 Stat. 1197.)

§ 418a. Rights and technical data

(a) Regulations; legitimate proprietary interest of United States

The legitimate proprietary interest of the United States and of a contractor in technical or other data shall be defined in regulations prescribed as part of the single system of Government-wide procurement regulations as defined in section 403(4) of this title. Such regulations may not impair any right of the United States or of any contractor with respect to patents or copyrights or any other right in technical data otherwise established by law. Such regulations shall provide, with respect to executive agencies that are subject to the provisions of title III of the Federal Property and Administrative Services Act of 1949 [41 U.S.C. 251 et seq.], that the United States may not require persons who have developed products or processes offered or to be offered for sale to the public as a condition for the procurement of such products or processes by the United States, to provide to the United States technical data relating to the design, development, or manufacture of such products or processes (except for such data as may be necessary for the United States to operate and maintain the product or use the process if obtained by the United States as an element of performance under the contract).

(b) Unlimited rights; technical data; developed with Federal funds; unrestricted, royalty-free right to use; rights under law

(1) Except as otherwise expressly provided by Federal statute, the regulations prescribed pursuant to subsection (a) of this section shall provide, with respect to executive agencies that are subject to the provisions of title III of the Federal Property and Administrative Services Act of 1949 [41 U.S.C. 251, et seq.], that the United States shall have unlimited rights in technical data developed exclusively with Federal funds if delivery of such data—

(A) was required as an element of performance under a contract; and

(B) is needed to ensure the competitive acquisition of supplies or services that will be required in substantial quantities in the future.

(2) Except as otherwise expressly provided by Federal statute, the regulations prescribed pursuant to subsection (a) of this section shall provide, with respect to executive agencies that are subject to the provisions of title III of the Federal Property and Administrative Services Act of 1949 [41 U.S.C. 251 et seq.], that the United States (and each agency thereof) shall have an unrestricted, royalty-free right to use, or to have its contractors use, for governmental purposes (excluding publication outside the Government) technical data developed exclusively with Federal funds.

(3) The requirements of paragraphs (1) and (2) shall be in addition to and not in lieu of any other rights that the United States may have pursuant to law.

(c) Factors; regulations

The following factors shall be considered in prescribing regulations pursuant to subsection (a) of this section:

(1) Whether the item or process to which the technical data pertains was developed—

(A) exclusively with Federal funds;

(B) exclusively at private expense; or

(C) in part with Federal funds and in part at private expense.

(2) The statement of congressional policy and objectives in section 200 of title 35, the statement of purposes in section 2(b) of the Small Business Innovation Development Act of 1982 (Public Law 97-219; 15 U.S.C. 638 note), and the declaration of policy in section 631 of title 15.

(3) The interest of the United States in increasing competition and lowering costs by developing and locating alternative sources of supply and manufacture.

(d) Provisions; contracts; regulations

Regulations prescribed under subsection (a) of this section shall require that a contract for property or services entered into by an executive agency contain appropriate provisions relating to technical data, including provisions—

(1) defining the respective rights of the United States and the contractor or subcontractor (at any tier) regarding any technical data to be delivered under the contract;

(2) specifying the technical data, if any, to be delivered under the contract and delivery schedules for such delivery;

(3) establishing or referencing procedures for determining the acceptability of technical data to be delivered under the contract;

(4) establishing separate contract line items for the technical data, if any, to be delivered under the contract;

(5) to the maximum practicable extent, identifying, in advance of delivery, technical data which is to be delivered with restrictions on the right of the United States to use such data;

(6) requiring the contractor to revise any technical data delivered under the contract to reflect engineering design changes made during the performance of the contract and affecting the form, fit, and function of the items specified in the contract and to deliver such revised technical data to an agency within a time specified in the contract;

(7) requiring the contractor to furnish written assurance at the time the technical data is delivered or is made available that the technical data is complete and accurate and satisfies the requirements of the contract concerning technical data;

(8) establishing remedies to be available to the United States when technical data required to be delivered or made available under the contract is found to be incomplete or inadequate or to not satisfy the requirements of the contract concerning technical data; and

(9) authorizing the head of the agency to withhold payments under the contract (or exercise such other remedies as the head of the agency considers appropriate) during any period if the contractor does not meet the requirements of the contract pertaining to the delivery of technical data.

(Pub. L. 93-400, § 21, as added Pub. L. 98-577, title III, § 301(a), Oct. 30, 1984, 98 Stat. 3074, and amended Pub. L. 99-145, title IX, § 961(d)(2), Nov. 8, 1985, 99 Stat. 704.)

* * * * *

CHAPTER 9—CONTRACT DISPUTES

§ 601. Definitions

As used in this chapter—

(1) the term "agency head" means the head and any assistant head of an executive agency, and may "upon the designation by" the head of an executive agency include the chief official of any principal division of the agency;

(2) the term "executive agency" means an executive department as defined in section 101 of title 5, an independent establishment as defined by section 104 of title 5 (except that it shall not include the General Accounting Office), a military department as defined by section 102 of title 5, and a wholly owned Government corporation as defined by section 9101(3) of title 31, the United States Postal Service, and the Postal Rate Commission;

(3) the term "contracting officer" means any person who, by appointment in accordance with applicable regulations, has the authority to enter into and administer contracts and make determinations and findings with respect thereto. The term also includes the authorized representative of the contracting officer, acting within the limits of his authority;

(4) the term "contractor" means a party to a Government contract other than the Government;

(5) the term "Administrator" means the Administrator for Federal Procurement Policy appointed pursuant to the Office of Federal Procurement Policy Act [41 U.S.C. 401 et seq.];

(6) the term "agency board" means an agency board of contract appeals established under section 607 of this title; and

(7) the term "misrepresentation of fact" means a false statement of substantive fact, or any conduct which leads to a belief of a substantive fact material to proper understanding of the matter in hand, made with intent to deceive or mislead.

(Pub. L. 95-563, § 2, Nov. 1, 1978, 92 Stat. 2383.)

EXPLANATORY NOTE

Short Title. Section 1 of Public Law 95-563, 99 Stat. 2383, provided that the Act, from which sections 601 to 613 of title 41 are derived, as well as provisions in titles 5, 28 and 31, can be cited as the "Contract Disputes Act of 1978."

§ 602. Applicability of law

(a) Executive agency contracts

Unless otherwise specifically provided herein, this chapter applies to any express or implied contract (including those of the nonappropriated fund activities described in sections 1346 and 1491 of title 28) entered into by an executive agency for—

(1) the procurement of property, other than real property in being;

(2) the procurement of services;

(3) the procurement of construction, alteration, repair or maintenance of real property; or,

(4) the disposal of personal property.

(b) Tennessee Valley Authority contracts

With respect to contracts of the Tennessee Valley Authority, the provisions of this chapter shall apply only to those contracts which contain a disputes clause requiring that a contract dispute be resolved through an agency administrative process. Notwithstanding any other provision of this chapter, contracts of the Tennessee Valley Authority for the sale of fertilizer or electric power or related to the conduct or operation of the electric power system shall be excluded from the chapter.

(c) Foreign government or international organization contracts

This chapter does not apply to a contract with a foreign government, or agency thereof, or international organization, or subsidiary body thereof, if the head of the agency determines that the application of the chapter to the contract would not be in the public interest.
(Pub. L. 95-563, § 3, Nov. 1, 1978, 92 Stat. 2383.)

* * * * *

§ 604. Fraudulent claims

If a contractor is unable to support any part of his claim and it is determined that such inability is attributable to misrepresentation of fact or fraud on the part of the contractor, he shall be liable to the Government for an amount equal to such unsupported part of the claim in addition to all costs to the Government attributable to the cost of reviewing said part of his claim. Liability under this section shall be determined within six years of the commission of such misrepresentation of fact or fraud.
(Pub. L. 95-563, § 5, Nov. 1, 1978, 92 Stat. 2384.)

§ 605. Decision by contracting officer

(a) Contractor claims

All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision. All claims by the government against a contractor relating to a contract shall be the subject of a decision by the contracting officer. The contracting officer shall issue his decision in writing, and shall mail or otherwise furnish a copy of the decision to the contractor. The decision shall state the reasons for the decision reached, and shall inform the contractor of his rights as provided in this chapter. Specific findings of fact are not required, but, if made, shall not be binding in any subsequent proceeding. The authority of this subsection shall not extend to a claim or dispute for penalties or forfeitures prescribed by statute or regulation which another Federal agency is specifically authorized to administer, settle, or determine. This section shall not authorize any agency head to settle, compromise, pay, or otherwise adjust any claim involving fraud.

(b) Review; performance of contract pending appeal

The contracting officer's decision on the claim shall be final and conclusive and not subject to review by any forum, tribunal, or Government agency, unless an appeal or suit is timely commenced as authorized by this chapter. Nothing in this chapter shall prohibit executive agencies from including a clause in government contracts requiring that pending final decision of an appeal, action, or final settlement, a contractor shall proceed diligently with performance of the contract in accordance with the contracting officer's decision.

(c) Amount of claim; certification; notification; time of issuance; presumption

(1) A contracting officer shall issue a decision on any submitted claim of $50,000 or less within sixty days from his receipt of a written request from the contractor that a decision be rendered within that period. For claims of more than $50,000, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable.

(2) A contracting officer shall, within sixty days of receipt of a submitted certified claim over $50,000—

(A) issue a decision; or

(B) notify the contractor of the time within which a decision will be issued.

(3) The decision of a contracting officer on submitted claims shall be issued within a reasonable time, in accordance with regulations promulgated by the agency, taking into account such factors as the size and complexity of the claim and the adequacy of the information in support of the claim provided by the contractor.

(4) A contractor may request the agency board of contract appeals to direct a contracting officer to issue a decision in a specified period of time, as determined by the board, in the event of undue delay on the part of the contracting officer.

(5) Any failure by the contracting officer to issue a decision on a contract claim within the period required will be deemed to be a decision by the

contracting officer denying the claim and will authorize the commencement of the appeal or suit on the claim as otherwise provided in this chapter. However, in the event an appeal or suit is so commenced in the absence of a prior decision by the contracting officer, the tribunal concerned may, at its option, stay the proceedings to obtain a decision on the claim by the contracting officer.

(Pub. L. 95-563, § 6, Nov. 1, 1978, 92 Stat. 2384.)

§ 606. Contractor's right of appeal to board of contract appeals

Within ninety days from the date of receipt of a contracting officer's decision under section 605 of this title, the contractor may appeal such decision to an agency board of contract appeals, as provided in section 607 of this title.

(Pub. L. 95–563, § 7, Nov. 1, 1978, 92 Stat. 2385.)

§ 607. Agency boards of contracts appeals

(a) Establishment; consultation; Tennessee Valley Authority

(1) Except as provided in paragraph (2) an agency board of contract appeals may be established within an executive agency when the agency head, after consultation with the Administrator, determines from a workload study that the volume of contract claims justifies the establishment of a full-time agency board of at least three members who shall have no other inconsistent duties. Workload studies will be updated at least once every three years and submitted to the Administrator.

(2) The Board of Directors of the Tennessee Valley Authority may establish a board of contract appeals for the Authority of an indeterminate number of members.

(b) Appointment of members; chairman; compensation

(1) Except as provided in paragraph (2), the members of agency boards shall be selected and appointed to serve in the same manner as administrative law judges appointed pursuant to section 3105 of title 5, with an additional requirement that such members shall have had not fewer than five years' experience in public contract law. Full-time members of agency boards serving as such on the effective date of this chapter shall be considered qualified. The chairman and vice chairman of each board shall be designated by the agency head from members so appointed. The chairman of each agency board shall receive compensation at a rate equal to that paid a GS–18 under the General Schedule contained in section 5332, of title 5, the vice chairman shall receive compensation at a rate equal to that paid a GS–17 under such General Schedule, and all other members shall receive compensation at a rate equal to that paid a GS–16 under such General Schedule. Such positions shall be in addition to the number of positions which may be placed in GS–16, GS–17, and GS–18 of such General Schedule under existing law.

(2) The Board of Directors of the Tennessee Valley Authority shall establish criteria for the appointment of members to its agency board of

contract appeals established in subsection (a)(2) of this section, and shall designate a chairman of such board. The chairman of such board shall receive compensation at a rate equal to the daily rate paid a GS–18 under the General Schedule contained in section 5332, of title 5, for each day he is engaged in the actual performance of his duties as a member of such board. All other members of such board shall receive compensation at a rate equal to the daily rate paid a GS–16 under such General Schedule for each day they are engaged in the actual performance of their duties as members of such board.

(c) **Appeals; inter-agency arrangements**

If the volume of contract claims is not sufficient to justify an agency board under subsection (a) of this section or if he otherwise considers it appropriate, any agency head shall arrange for appeals from decisions by contracting officers of his agency to be decided by a board of contract appeals of another executive agency. In the event an agency head is unable to make such an arrangement with another agency, he shall submit the case to the Administrator for placement with an agency board. The provisions of this subsection shall not apply to the Tennessee Valley Authority.

(d) Jurisdiction

Each agency board shall have jurisdiction to decide any appeal from a decision of a contracting officer (1) relative to a contract made by its agency, and (2) relative to a contract made by any other agency when such agency or the Administrator has designated the agency board to decide the appeal. In exercising this jurisdiction, the agency board is authorized to grant any relief that would be available to a litigant asserting a contract claim in the United States Claims Court.

(e) **Decisions**

An agency board shall provide to the fullest extent practicable, informal, expeditious, and inexpensive resolution of disputes, and shall issue a decision in writing or take other appropriate action on each appeal submitted, and shall mail or otherwise furnish a copy of the decision to the contractor and the contracting officer.

(f) Accelerated appeal disposition

The rules of each agency board shall include a procedure for the accelerated disposition of any appeal from a decision of a contracting officer where the amount in dispute is $50,000 or less. The accelerated procedure shall be applicable at the sole election of only the contractor. Appeals under the accelerated procedure shall be resolved, whenever possible, within one hundred and eighty days from the date the contractor elects to utilize such procedure.

(g) Review

(1) The decision of an agency board of contract appeals shall be final, except that—

(A) a contractor may appeal such a decision to the United States Court of Appeals for the Federal Circuit within one hundred twenty days after the date of receipt of a copy of such decision, or

(B) the agency head, if he determines that an appeal should be taken, and with the prior approval of the Attorney General, transmits the decision of the board of contract appeals to the Court of Appeals for the Federal Circuit for judicial review under section 1295 of title 28, within one hundred and twenty days from the date of the agency's receipt of a copy of the board's decision.

(2) Notwithstanding the provisions of paragraph (1), the decision of the board of contract appeals of the Tennessee Valley Authority shall be final, except that—

(A) a contractor may appeal such a decision to a United States district court pursuant to the provisions of section 1337 of title 28, within one hundred twenty days after the date of receipt of a copy of such decision, or

(B) The Tennessee Valley Authority may appeal the decision to a United States district court pursuant to the provisions of section 1337 of title 28, within one hundred twenty days after the date of the decision in any case.

(h) Procedural guidelines

Pursuant to the authority conferred under the Office of Federal Procurement Policy Act [41 U.S.C. 401 et seq.], the Administrator is authorized and directed, as may be necessary or desirable to carry out the provisions of this chapter, to issue guidelines with respect to criteria for the establishment, functions, and procedures of the agency boards (except for a board established by the Tennessee Valley Authority).

(Pub. L. 95–563, § 8, Nov. 1, 1978, 92 Stat. 2385; Pub. L. 97–164, title I, § § 156, 160(a)(15), Apr. 2, 1982, 96 Stat. 47, 48.)

§ 608. Small claims

(a) Accelerated disposition of appeals

The rules of each agency board shall include a procedure for the expedited disposition of any appeal from a decision of a contracting officer where the amount in dispute is $10,000 or less. The small claims procedure shall be applicable at the sole election of the contractor.

(b) Simplified rules of procedure

The small claims procedure shall provide for simplified rules of procedure to facilitate the decision of any appeal thereunder. Such appeals may be decided by a single member of the agency board with such concurrences as may be provided by rule or regulation.

(c) Time of decision

Appeals under the small claims procedure shall be resolved, whenever possible, within one hundred twenty days from the date on which the contractor elects to utilize such procedure.

(d) Finality of decision

A decision against the Government or the contractor reached under the small claims procedure shall be final and conclusive and shall not be set aside except in cases of fraud.

(e) Effect of decision

Administrative determinations and final decisions under this section shall have no value as precedent for future cases under this chapter.

(f) Review of requisite amount in controversy

The Administrator is authorized to review at least every three years, beginning with the third year after November 1, 1978, the dollar amount defined in subsection (a) of this section as a small claim, and based upon economic indexes selected by the Administrator adjust that level accordingly.
(Pub. L. 95–953, § 9, Nov. 1, 1978, 92 Stat. 2387.)

§ 609. Judicial review of board decisions

(a) Actions in United States Claims Court; district court actions; time for filing

(1) Except as provided in paragraph (2), and in lieu of appealing the decision of the contracting officer under section 605 of this title to an agency board, a contractor may bring an action directly on the claim in the United States Claims Court, notwithstanding any contract provision, regulation, or rule of law to the contrary.

(2) In the case of an action against the Tennessee Valley Authority, the contractor may only bring an action directly on the claim in a United States district court pursuant to section 1337 of title 28, notwithstanding any contract provision, regulation, or rule of law to the contrary.

(3) Any action under paragraph (1) or (2) shall be filed within twelve months from the date of the receipt by the contractor of the decision of the contracting officer concerning the claim, and shall proceed de novo in accordance with the rules of the appropriate court.

(b) Finality of board decision

In the event of an appeal by a contractor or the Government from a decision of any agency board pursuant to section 607 of this title, notwithstanding any contract provision, regulation, or rules of law to the contrary, the decision of the agency board on any question of law shall not be final or conclusive, but the decision on any question of fact shall be final and conclusive and shall not be set aside unless the decision is fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence.

(c) Remand or retention of case

In any appeal by a contractor or the Government from a decision of an agency board pursuant to section 607 of this title, the court may render an opinion and judgement and remand the case for further action by the agency board or by the executive agency as appropriate, with such direction as the court considers just and proper.

(d) Consolidation

If two or more suits arising from one contract are filed in the United States Claims Court and one or more agency boards, for the convenience of parties or witnesses or in the interest of justice, the United States Claims Court may order the consolidation of such suits in that court or transfer any suits to or among the agency boards involved.

(e) Judgments as to fewer than all claims

In any suit filed pursuant to this chapter involving two or more claims, counterclaims, cross-claims, or third-party claims, and where a portion of one such claim can be divided for purposes of decision or judgment, and in any such suit where multiple parties are involved, the court, whenever such action is appropriate, may enter a judgment as to one or more but fewer than all of the claims, portions thereof, or parties.
(Pub. L. 95–563, § 10, Nov. 1, 1978, 92 Stat. 2388; Pub. L. 97–164, title I, §§ 157, 160(a)(15), 161(10), Apr. 2, 1982, 96 Stat. 47–49.)

§ 610. Subpoena, discovery, and deposition

A member of an agency board of contract appeals may administer oaths to witnesses, authorize depositions and discovery proceedings, and require by subpoena the attendance of witnesses, and production of books and papers, for the taking of testimony or evidence by deposition or in the hearing of an appeal by the agency board. In case of contumacy or refusal to obey a subpoena by a person who resides, is found, or transacts business within the jurisdiction of a United States district court, the court, upon application of the agency board through the Attorney General; or upon application by the board of contract appeals of the Tennessee Valley Authority, shall have jurisdiction to issue the person an order requiring him to appear before the agency board or a member thereof, to produce evidence or to give testimony, or both. Any failure of any such person to obey the order of the court may be punished by the court as a contempt thereof.
(Pub. L. 95–563, § 11, Nov. 1, 1978, 92 Stat. 2388.).

§ 611. Interest

Interest on amounts found due contractors on claims shall be paid to the contractor from the date the contracting officer receives the claim pursuant to section 605(a) of this title from the contractor until payment thereof. The interest provided for in this section shall be paid at the rate established by the Secretary of the Treasury pursuant to Public Law 92–41 (85 Stat. 97) for the Renegotiation Board.
(Pub. L. 95–563, § 12, Nov. 1, 1978, 92 Stat. 2389.)

§ 612. Payment of claims

(a) Judgments

Any judgment against the United States on a claim under this chapter shall be paid promptly in accordance with the procedures provided by section 1304 of title 31.

(b) Monetary awards

Any monetary award to a contractor by an agency board of contract appeals shall be paid promptly in accordance with the procedures contained in subsection (a) of this section.

(c) Reimbursement

Payments made pursuant to subsections (a) and (b) of this section shall be reimbursed to the fund provided by section 1304 of title 31 by the agency whose appropriations were used for the contract out of available funds or by obtaining additional appropriations for such purposes.

(d) Tennessee Valley Authority

(1) Notwithstanding the provisions of subsection (a) through (c) of this section, any judgment against the Tennessee Valley Authority on a claim under this chapter shall be paid promptly in accordance with the provisions of section 831h(b) of title 16.

(2) Notwithstanding the provisions of subsection (a) through (c), any monetary award to a oontractor by the board of contract appeals for the Tennessee Valley Authority shall be paid in accordance with the provisions of section 831h(b) of title 16.

(Pub. L. 95–563, § 13, Nov. 1, 1978, 92 Stat. 2389.)

§ 613. Separability of provisions

If any provision of this chapter, or the application of such provision to any persons or circumstances, is held invalid, the remainder of this chapter, or the application of such provision to persons or circumstances other than those to which it is held invalid, shall not be affected thereby.

(Pub. L. 95–563, § 15, Nov. 1, 1978, 92 Stat. 2391.)

TITLE 42, U.S. CODE—THE PUBLIC HEALTH AND WELFARE

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CHAPTER 6A—PUBLIC HEALTH SERVICE

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SUBCHAPTER XII—SAFETY OF PUBLIC WATER SYSTEMS

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§ 300j–6. Federal agencies

(a) Compliance with Federal, State, and local requirements, etc.; scope of applicability of compliance requirements, etc.; liability for civil penalties

Each Federal agency (1) having jurisdiction over any federally owned or maintained public water system or (2) engaged in any activity resulting, or which may result in, underground injection which endangers drinking water (within the meaning of section 300h(d)(2) of this title) shall be subject to, and comply with, all Federal, State, and local requirements, administrative authorities, and process and sanctions respecting the provision of safe drinking water and respecting any underground injection program in the same manner, and to the same extent, as any nongovernmental entity. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits, and any other requirement whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process or sanction, whether enforced in Federal, State, or local courts or in any other manner. This subsection shall apply, notwithstanding any immunity of such agencies, under any law or rule of law. No officer, agent, or employee of the United States shall be personally liable for any civil penalty under this subchapter with respect to any act or omission within the scope of his official duties.

* * * * *

(c) Indian rights and sovereignty as unaffected; "Federal agency" defined

(1) Nothing in the Safe Drinking Water Amendments of 1977 shall be construed to alter or affect the status of American Indian lands or water rights nor to waive any sovereignty over Indian lands guaranteed by treaty or statute.

(2) For the purposes of this chapter, the term "Federal agency" shall not be construed to refer to or include any American Indian tribe, nor to the Secretary of the Interior in his capacity as trustee of Indian lands.
(July 1, 1944, ch. 373, title XIV, § 1447, as added Dec. 16, 1974, Pub. L. 93-523, § 2(a), 88 Stat. 1688, and amended Nov. 16, 1977, Pub. L. 95-190, § 8(a), (d), 91 Stat. 1396, 1397.)

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CHAPTER 21—CIVIL RIGHTS

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SUBCHAPTER V—FEDERALLY ASSISTED PROGRAMS

§ 2000d. Prohibition against exclusion from participation in, denial of benefits of, and discrimination under federally assisted program on ground of race, color, or national origin

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.
(Pub. L. 88-352, title VI, § 601, July 2, 1964, 78 Stat. 252.)

EXPLANATORY NOTE

Short Title. Section 1 of Public Law 88-352, 78 Stat. 241, provides that the Act may be cited as the "Civil Rights Act of 1964." Sections 2000d to 2000d-5 of title 42 derive from title VI of the 1964 Act, and sections 2000e to 2000e-17 of title 42 derive from title VII of the 1964 Act.

§ 2000d-1. Federal authority and financial assistance to programs or activities by way of grant, loan, or contract other than contract of insurance or guaranty; rules and regulations; approval by President; compliance with requirements; reports to Congressional committees; effective date of administrative action

Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however*, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

(Pub. L. 88–352, title VI, § 602, July 2, 1964, 78 Stat. 252.)

§ 2000d–2. Judicial review; administrative procedure provisions

Any department or agency action taken pursuant to section 2000d–1 of this title shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 2000d–1 of this title, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with chapter 7 of title 5, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of that chapter.

(Pub. L. 88–352, title VI, § 603, July 2, 1964, 78 Stat. 253.)

§ 2000d–3. Construction of provisions not to authorize administrative action with respect to employment practices except where primary objective of Federal financial assistance is to provide employment

Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

(Pub. L. 88–352, title VI, § 604, July 2, 1964, 78 Stat. 253.)

§ 2000d–4. Federal authority and financial assistance to programs or activities by way of contract of insurance or guaranty

Nothing in this subchapter shall add to or detract from any existing authority with respect to any program or activity under which Federal financial assistance is extended by way of a contract of insurance or guaranty.

(Pub. L. 88–352, title VI, § 605, July 2, 1964, 78 Stat. 253.)

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SUBCHAPTER VI—EQUAL EMPLOYMENT OPPORTUNITIES

§ 2000e. Definitions

For the purposes of this subchapter—

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) twenty-five or more during the first year after March 24, 1972, or (B) fifteen or more thereafter, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended [29 U.S.C. 151 et seq.], or the Railway Labor Act, as amended [45 U.S.C. 151 et seq.];

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercises of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C. 401 et seq.], and further includes any governmental industry, business, or activity.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act [43 U.S.C. 1331 et seq.].

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e–2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided*, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

(Pub. L. 88–352, title VII, § 701, July 2, 1964, 78 Stat. 253; Pub. L. 89–554, § 8(a), Sept. 6, 1966, 80 Stat. 662; Pub. L. 92–261, § 2, Mar. 24, 1972, 86 Stat. 103; Pub. L. 95–555, § 1, Oct. 31, 1978, 92 Stat. 2076; Pub. L. 95–598, title III, § 330, Nov. 6, 1978, 92 Stat. 2679.)

§ 2000e–1. Subchapter not applicable to employment of aliens outside State and individuals for performance of activities of religious corporations, associations, educational institutions, or societies.

This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

(Pub. L. 88–352, title VII, § 702, July 2, 1964, 78 Stat. 255; Pub. L. 92–261, § 3, Mar. 24, 1972, 86 Stat. 103.)

§ 2000e–2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency practices

It shall be an unlwful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race color, religion, sex, or national origin.

(c) Labor organization practices

It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or an as applicant for employment. because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training programs

It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) Members of Communist Party of Communist-action or Communist-front organizations

As used in this subchapter, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950 [50 U.S.C. 781 et seq.].

(g) National security

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if—

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees or such employer if such differentiation is authorized by the provisions of section 206(d) of title 29.

(i) Businesses or enterprises extending preferential treatment to Indians

Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

(Pub. L. 88–352, title VII, § 703, July 2, 1964, 78 Stat. 255; Pub. L. 92–261. § 8(a), (b), Mar. 24, 1972, 86 Stat. 109.)

* * * * *

CHAPTER 65—NOISE CONTROL

§ 4901. Congressional findings and statement of policy

(a) The Congress finds—

(1) that inadequately controlled noise presents a growing danger to the health and welfare of a Nation's population, particularly in urban areas;

(2) that the major sources of noise include transportation vehicles and equipment, machinery, appliances, and other products in commerce; and

(3) that, while primary responsibility for control of noise rests with State and local governments, Federal action is essential to deal with major noise sources in commerce control of which require national uniformity of treatment.

(b) The Congress declares that it is the policy of the United States to promote an environment for all Americans free from noise that jeopardizes their health or welfare. To that end, it is the purpose of this chapter to establish a means for effective coordination of Federal research and activities in noise control, to authorize the establishment of Federal noise emission standards for products distributed in commerce, and to provide information to the public respecting the noise emission and noise reduction characteristics of such products.

(Pub. L. 92–574, § 2, Oct. 27, 1972, 86 Stat. 1234.)

EXPLANATORY NOTE

Short Title. Section 1 of Public Law 92–574, 86 Stat. 1234, from which sections 4901 to 4917 of title 42 derive, provides that the Act may be cited as the "Noise Control Act of 1972."

§ 4902. Definitions

For purposes of this chapter:

(1) The term "Administrator" means the Administrator of the Environmental Protection Agency.

(2) The term "person" means an individual, corporation, partnership, or association, and (except as provided in sections 4910(e) and 4911(a) of this title) includes any officer, employee, department, agency, or instrumentality of the United States, a State, or any political subdivision of a State.

* * * * *

(10) The term "Federal agency" means an executive agency (as defined in section 105 of title 5) and includes the United States Postal Service.

(11) The term "environmental noise" means the intensity, duration, and the character of sounds from all sources.

(Pub. L. 92–574, § 3, Oct. 27, 1972, 86 Stat. 1234.)

§ 4903. Federal programs

(a) Furtherance of Congressional policy

The Congress authorizes and directs that Federal agencies shall, to the fullest extent consistent with their authority under Federal laws administered by them, carry out the programs within their control in such a manner as to further the policy declared in section 4901(b) of this title.

(b) Presidential authority to exempt activities or facilities from compliance requirements

Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government—

(1) having jurisdiction over any property or facility, or

(2) engaged in any activity resulting, or which may result, in the emission of noise,

shall comply with Federal, State, Interstate, and local requirements respecting control and abatement of environmental noise to the same extent that any person is subject to such requirements. The President may exempt any single activity or facility, including noise emission sources or classes thereof, of any department, agency, or instrumentality in the executive branch from compliance with any such requirement if he determines it to be in the paramount interest of the United States to do so; except that no exemption, other than for those products referred to in section 4902(3)(B) of this title, may be granted from the requirements of sections 4905, 4916, and 4917 of this title. No such exemption shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods of not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting such exemption.

(c) Coordination of programs of Federal agencies; standards and regulations; status reports

(1) The Administrator shall coordinate the programs of all Federal agencies relating to noise research and noise control. Each Federal agency shall, upon request, furnish to the Administrator such information as he may reasonably require to determine the nature, scope, and results of the noise-research and noise-control programs of the agency.

(2) Each Federal agency shall consult with the Administrator in prescribing standards or regulations respecting noise. If at any time the Administrator has reason to believe that a standard or regulation, or any proposed standard or regulation, of any Federal agency respecting noise does not protect the public health and welfare to the extent he believes to be required and feasible, he may request such agency to review and report to him on the advisability of revising such standard or regulation to provide such protection. Any such request may be published in the Federal Register and shall be accompanied by a detailed statement of the information on which it is based. Such agency shall complete the requested review and report to the Administrator within such time as the Administrator specified in the request, but such time specified may not be less than ninety days from the date the request was made. The report shall be published in the Federal Register and shall be accompanied by a detailed statement of the findings

and conclusions of the agency respecting the revision of its standard or regulation. With respect to the Federal Aviation Administration, section 1431 of title 49 Appendix shall apply in lieu of this paragraph.

(3) On the basis of regular consultation with appropriate Federal agencies, the Administrator shall compile and publish, from time to time, a report on the status and progress of Federal activities relating to noise research and noise control. This report shall describe the noise-control programs of each Federal agency and assess the contributions of those programs to the Federal Government's overall efforts to control noise.

(Pub. L. 92–574, § 4, Oct. 27, 1972, 86 Stat. 1235.)

§ 4904. Identification of major noise sources

(a) Development and publication of criteria

(1) The Administrator shall, after consultation with appropriate Federal agencies and within nine months of October 27, 1972, develop and publish criteria with respect to noise. Such criteria shall reflect the scientific knowledge most useful in indicating the kind and extent of all identifiable effects on the public health or welfare which may be expected from differing quantities and qualities of noise.

(2) The Administrator shall, after consultation with appropriate Federal agencies and within twelve months of October 27, 1972, publish information on the levels of environmental noise the attainment and maintenance of which in defined areas under various conditions are requisite to protect the public health and welfare with an adequate margin of safety.

(b) Compilation and publication of reports on noise sources and control technology

The Administrator shall, after consultation with appropriate Federal agencies, compile and publish a report or series of reports (1) identifying products (or classes of products) which in his judgment are major sources of noise, and (2) giving information on techniques for control of noise from such products, including available data on the technology, costs, and alternative methods of noise control. The first such report shall be published not later than eighteen months after October 27, 1972.

(c) Supplemental criteria and reports

The Administrator shall from time to time review and, as appropriate, revise or supplement any criteria or reports published under this section.

(d) Publication in Federal Register

Any report (or revision thereof) under subsection (b)(1) of this section identifying major noise sources shall be published in the Federal Register. The publication or revision under this section of any criteria or information on control techniques shall be announced in the Federal Register, and copies shall be made available to the general public.

(Pub. L. 92–574, § 5, Oct 27, 1972, 86 Stat. 1236.)

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CHAPTER 85—AIR POLLUTION PREVENTION AND CONTROL

SUBCHAPTER I—PROGRAMS AND ACTIVITIES

PART A—AIR QUALITY AND EMISSION LIMITATIONS

* * * * *

§ 7407. Air quality control regions

(a) Responsibility of each State for air quality; submission of implementation plan

Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

* * * * *

(July 14, 1955, ch. 360, title I, § 107, as added Dec. 31, 1970, Pub. L. 91–604, § 4(a), 84 Stat. 1678, and amended Aug. 7, 1977, Pub. L. 95–95, title I, § 103, 91 Stat. 687.)

EXPLANATORY NOTES

Editor's Note. The clean air requirements and procedures of Federal law are extremely complex. Included herein are only some selected extracts of that law deemed sufficient to acquaint the reader with the major concepts and terms, and to enable the reader to understand typical statutory references in Federal contracts. Most of the provisions relating to the content, formulation and enforcement of standards and implementation plans have been omitted.

Short Titles; Codification. The Act of July 14, 1955, chapter 360, 69 Stat. 322, was a short statute that authorized research and technical assistance relating to air pollution control. It was codified at 42 U.S.C. § 1857 *et seq.* Over the years the 1955 Act has been extensively revised and expanded by a number of statutes. Among these, the Act of December 17, 1963, Public Law 88–206, 77 Stat. 392, provided that the 1955 Act may be cited as the "Clean Air Act"; the Act of October 19, 1965, Public Law 89–272, 79 Stat. 992, renumbered and arranged the sections in titles; the Act of December 31, 1970, Public Law 91–604, 84 Stat. 1676 (the "Clean Air Amendments of 1970") added provisions relating to air quality control regions, national ambient air quality standards and State implementation plans; and the Act of August 7, 1977, Public Law 95–95, 91 Stat. 685 (the "Clean Air Amendments of 1977") added to subchapter I part B (Ozone Protection), part C (Prevention of Significant Deterioration of Air Quality), and part D (Plan Requirements for Nonattainment Areas). Subsequent to the 1977 revisions the Clean Air Act was transferred from sections 1857 *et seq.* to sections 7401 *et seq.* of title 42 of the U.S. Code.

§ 7408. Air quality criteria and control techniques

(a) Air pollutant list; publication and revision by Administrator; issuance of air quality criteria for air pollutants

(1) For the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall within 30 days after December 31, 1970, publish, and shall from time to time thereafter revise, a list which includes each air pollutant—

(A) emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare:

(B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and

(C) for which air quality criteria had not been issued before December 31, 1970 but for which he plans to issue air quality criteria under this section.

(2) The Administrator shall issue air quality criteria for an air pollutant within 12 months after he has included such pollutant in a list under paragraph (1). Air quality criteria for an air pollutant shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities. The criteria for an air pollutant, to the extent practicable, shall include information on—

(A) those variable factors (including atmospheric conditions) which of themselves or in combination with other factors may alter the effects on public health or welfare of such air pollutant;

(B) the types of air pollutants which, when present in the atmosphere, may interact with such pollutant to produce an adverse effect on public health or welfare; and

(C) any known or anticipated adverse effects on welfare.

* * * * *

(July 14, 1955, ch. 360, title I, § 108, as added Dec. 31, 1970, Pub. L. 91-604, § 4(a), 84 Stat. 1678, and amended Aug. 7, 1977, Pub. L. 95-95, title I, §§ 104, 105, title IV, § 401(a), 91 Stat. 689, 790.)

§ 7409. National primary and secondary ambient air quality standards

(a) Promulgation

(1) The Administrator—

(A) within 30 days after December 31, 1970, shall publish proposed regulations prescribing a national primary ambient air quality standard and a national secondary ambient air quality standard for each air pollutant for which air quality criteria have been issued prior to such date; and

(B) after a reasonable time for interested persons to submit written comments thereon (but no later than 90 days after the initial publicaiton of such proposed standards) shall by regulation promulgate such proposed national primary and secondary ambient air quality standards with such modifications as he deems appropriate.

(2) With respect to any air pollutant for which air quality criteria are issued after December 31, 1970, the Administrator shall publish, simultaneously with the issuance of such criteria and information, proposed national primary and secondary ambient air quality standards for any such pollutant. The procedure provided for in paragraph (1)(B) of this subsection shall apply to the promulgation of such standards.

(b) Protection of public health and welfare

(1) National primary ambient air quality standards, prescribed under subsection (a) of this section shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipaed adverse effects associated with the presence of such air pollutant in the ambient air. Such secondary standards may be revised in the same manner as promulgated.

(2) Any national secondary ambient air quality standard prescribed under subsection (a) of this section shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air. Such secondary standards may be revised in the same manner as promulgated.

(July 14, 1955, ch. 360, title I, § 109, as added Dec. 31, 1970, Pub. L. 91-604, § 4(a), 84 Stat. 1679, and amended Aug. 7, 1977, Pub. L. 95-95, title I, § 106, 91 Stat. 691.)

§ 7410. State implementation plans for national primary and secondary ambient air quality standards

(a) Adoption of plan by State; submission to Administrator; content of plan; revision; new sources; indirect source review program; supplemental or intermittent control systems

(1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within nine months after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 7409 of this title for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within nine months after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides

for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan, or any portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—

* * * * *

(3)(A) The Administrator shall approve any revision of an implementaiton plan applicable to an air quality control region if he determines that it meets the requirements of paragraph (2) and has been adopted by the State after reasonable notice and public hearings.

* * * * *

(c) Preparation and publication by Administrator of proposed regulations setting forth implementation plan; transportation regulations study and report; parking surcharge; suspension authority; plan implementation

(1) The Administrator shall, after consideration of any State hearing record, promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State if—

(A) the State fails to submit an implementation plan which meets the requirements of this section,

(B) the plan, or any portion thereof, submitted for such State is determined by the Administrator not to be in accordance with the requirements of this section, or

(C) the State fails, within 60 days after notification by the Administrator or such longer period as he may prescribe, to revise an implementation plan as required pursuant to a provision of its plan referred to in subsection (a)(2)(H) of this section.

* * * * *

(h) Annual publication of comprehensive document for each State setting forth requirements of applicable implementation plan

(1) Not later than one year after August 7, 1977, and annually thereafter, the Administrator shall assemble and publish a comprehensive document for each State setting forth all requirements of the applicable implementation plan for such State and shall publish notice in the Federal Register of the availability of such documents. Each such document shall be revised as frequently as practicable but not less often than annually.

(2) The Administrator may promulgate such regulations as may be reasonably necessary to carry out the purpose of this subsection.

* * * * *

(July 14, 1955, ch. 360, title I, § 110, as added Dec. 31, 1970, Pub. L. 91-604, § 4(a), 84 Stat. 1680, and amended June 22, 1974, Pub. L. 93-319, § 4, 88 Stat. 256; S. Res. 4, Feb. 4, 1977; Aug. 7, 1977, Pub. L. 95-95, title I, §§ 107, 108, 91 Stat. 691, 693; Nov. 16, 1977, Pub. L. 95-190, § 14(a)(1)-(6), 91 Stat. 1399; July 17, 1981, Pub. L. 97-23, § 3, 95 Stat. 142.)

§ 7411. Standards of performance for new stationary sources

(a) Definitions

For purposes of this section:

(1) The term "standard of performance" means—

(A) with respect to any air pollutant emitted from a category of fossil fuel fired stationary sources to which subsection (b) of this section applies, a standard—

(i) establishing allowable emission limitations for such category of sources, and

(ii) requiring the achievement of a percentage reduction in the emissions from such category of sources from the emissions which would have resulted from the use of fuels which are not subject to treatment prior to combustion.

(B) with respect to any air pollutant emitted from a category of stationary sources (other than fossil fuel fired sources) to which subsection (b) of this section applies, a standard such as that referred to in subparagraph (A)(i); and

(C) with respect to any air pollutant emitted from a particular source to which subsection (d) of this section applies, a standard which the State (or the Administrator under the conditions specified in subsection (d)(2) of this section) determines is applicable to that source and which reflects the degree of emission reduction achievable through the application of the best system of continuous emission reduction which (taking into consideration the cost of achieving such emission reduction, and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated for that category of sources.

For the purpose of subparagraphs (A)(i) and (ii) and (B), a standard of performance shall reflect the degree of emission limitation and the percentage reduction achievable through application of the best technological system of continous emission reduction which (taking into consideration the cost of achieving such emission reduction, any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated. For the purpose of subparagraph (1)(A)(ii), any cleaning of the fuel or reduction in the pollution characteristics of the fuel after extraction and prior to combustion may be credited, as determined under regulations promulgated by the Administrator, to a source which burns such fuel.

(2) The term "new source" means any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source.

(3) The term "stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant.

(4) The term "modification" means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

(5) The term "owner or operator" means any person who owns, leases, operates, controls, or supervises a stationary source.

(6) The term "existing source" means any stationary source other than a new source.

(7) The term "technological system of continuous emission reduction" means—

(A) a technological process for production or operation by any source which is inherently low-polluting or nonpolluting, or

(B) a technological system for continuous reduction of the pollution generated by a source before such pollution is emitted into the ambient air, including precombustion cleaning or treatment of fuels.

(8) A conversion to coal (A) by reason of an order under section 2(a) of the Energy Supply and Environmental Coordination Act of 1974 [15 U.S.C. 792(a)] or any amendment thereto, or any subsequent enactment which supersedes such Act [15 U.S.C. 791 et. seq.], or (B) which qualifies under section 7413(d)(5)(A)(ii) of this title, shall not be deemed to be a modification for purposes of paragraphs (2) and (4) of this subsection.

(b) List of categories of stationary sources; standards of performance; information on pollution control techniques; sources owned or operated by United States; particular systems; revised standards

(1)(A) The Administrator shall, within 90 days after December 31, 1970, publish (and from time to time thereafter shall revise) a list of categories of stationary sources. He shall include a category of sources in such list if in his judgment it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.

(B) Within 120 days after the inclusion of a category of stationary sources in a list under subparagraph (A), the Administrator shall publish proposed regulations, establishing Federal standards of performance for new sources within such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within 90 days after such publication, such standards with such modifications as he deems appropriate. The Administrator shall, at least every four years, review and, if appropriate, revise such standards following the procedure required by this subsection of promulgation of such standards. Standards of performance or revisions thereof shall become effective upon promulgation.

(2) The Administrator may distinguish among classes, types, and sizes within categories of new sources for the purpose of establishing such standards.

(3) The Administrator shall, from time to time, issue information on pollutio control techniques for categories of new sources and air pollutants subject to the provisions of this section.

(4) The provisions of this section shall apply to any new source owned or operated by the United States.

(5) Except as otherwise authorized under subsection (h) of this section, nothing in this section shall be construed to require, or to authorize the Administrator to require, any new or modified source to install and operate any particular technological system of continuous emission reduction to comply with any new source standard of performance.

(6) The revised standards of performance required by enactment of subsection (a)(1)(A)(i) and (ii) of this section shall be promulgated not later than one year after August 7, 1977. Any new or modified fossil fuel fired stationary source which commences construction prior to the date of publication of the proposed revised standards shall not be required to comply with such revised standards.

(c) State implementation and enforcement of standards of performance

(1) Each State may develop and submit to the Administrator a procedure for implementing and enforcing standards of performance for new sources located in such State. If the Administrator finds the State procedure is adequate, he shall delegate to such State any authority he has under this chapter to implement and enforce such standards.

(2) Nothing in this subsection shall prohibit the Administrator from enforcing any applicable standard of performance under this section.

(d) Standards of performance for existing sources; remaining useful life of source

(1) The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 7410 of this title under which each State shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section 7408(a) or 7412(b)(1)(A) of this title but (ii) to which a standard of performance under this section would apply if such existing source were a new source, and (B) provides for the implementation and enforcement of such standards of performance. Regulations of the Administrator under this paragraph shall permit the State in applying a standard of performance to any particular source under a plan submitted under this paragraph to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies.

(2) The Administrator shall have the same authority—

(A) to prescribe a plan for a State in cases where the State fails to submit a satisfactory plan as he would have under section 7410(c) of this title in the case of failure to submit an implementation plan, and

(B) to enforce the provisions of such plan in cases where the State fails to enforce them as he would have under sections 7413 and 7414 of this title with respect to an implementation plan.

In promulgating a standard of performance under a plan prescribed under this paragraph, the Administrator shall take into consideration, among other factors, remaining useful lives of the sources in the category of sources to which such standard applies.

(e) Prohibited acts

After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.

(f) New source standards of performance

(1) Not later than one year after August 7 1977, the Administrator shall promulgate regulations listing under subsection (b)(1)(A) of this section the categories of major stationary sources which are not on August 7, 1977, included on the list required under subseciton (b)(1)(A) of this section. The Administrator shall promulgate regulations establishing standards of performance for the percentage of such categories of sources set forth in the following table before the expiration of the corresponding period set forth in such table:

Percentage of source categories required to be listed for which standards must be established	Period by which standards must be promulgated after date list is required to be promulgated:
25	2 years.
75	3 years.
100	4 years.

(2) In determining priorities for promulgating standards for categories of major stationary sources for the purpose of paragraph (1), the Administrator shall consider—

(A) the quantity of air pollutant emissions which each such category will emit, or will be designed to emit;

(B) the extent to which each such pollutant may reasonably be anticipated to endanger public health or welfare; and

(C) the mobility and competitive nature of each such category of sources and the consequent need for nationally applicable new source standards of performance.

(3) Before promulgating any regulations under this subsection or listing any category of major stationary sources as required under this subsection, the Administrator shall consult with appropriate representatives of the Governors and State air pollution control agencies.

* * * * *

(h) Design, equipment, work practice, or operational standard; alternative emission limitation

(1) For purposes of this section, if in the judgment of the Administrator, it is not feasible to prescribe or enforce a standard of performance, he may instead promulgate a design, equipment, work practice, or operational standard, or combination thereof, which reflects the best technological system of continuous emission reduction which (taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated. In the event the Administrator promulgates a design or equipment standard under this subsection, he shall include as part of such standard such requirements as will assure the proper operation and maintenance of any such element of design or equipment.

(2) For the purpose of this subsection, the phrase "not feasible to prescribe or enforce a standard of performance" means any situation in which the Administrator determines that (A) a pollutant or pollutants cannot be emitted through a conveyance designed and constructed to emit or capture such pollutant, or that any requirement for, or use of, such a conveyance would be inconsistent with any Federal, State, or local law, or (B) the application of measurement methodology to a particular class of sources is not practicable due to technological or economic limitations.

(3) If after notice and opportunity for public hearing, any person establishes to the satisfaction of the Administrator that an alternative means of emission limitation will achieve a reduction in emissions of any air pollutant at least equivalent to the reduction in emissions of such air pollutant achieved under the requirements of paragraph (1), the Administrator shall permit the use of such alternative by the source for purposes of compliance with this section with respect to such pollutant.

(4) Any standard promulgated under paragraph (1) shall be promulgated in terms of standard of performance whenever it becomes feasible to promulgate and enforce such standard in such terms.

(5) Any design, equipment, work practice, or operational standard, or any combination thereof, described in this subsection shall be treated as a standard of performance for purposes of the provisions of this chapter (other than the provisions of subsection (a) of this section and this subsection).

(July 14, 1955 ch. 360, title I, § 111 as added Dec. 31, 1970, Pub. L. 91-604, § 4(a), 84 Stat. 1683, and amended Nov. 18, 1971, Pub. L. 92-157, title III, § 302(f), 85 Stat. 464; Aug. 7, 1977, Pub. L. 95-95, title I, § 109(a)-

(d)(1), (e), (f), title IV, § 401(b), 91 Stat. 697-703, 791; Nov. 16, 1977, Pub. L. 95-190, § 14(a)(7)-(9), 91 Stat. 1399; Nov. 9, 1978, Pub. L. 95-623, § 13(a), 92 Stat. 3457.)

§ 7412. National emission standards for hazardous air pollutants

(a) Definitions

For purposes of this section—

(1) The term "hazardous air pollutant" means an air pollutant to which no ambient air quality standard is applicable and which in the judgment of the Administrator causes, or contributes to, air pollution which may reasonably be anticipated to result in an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness.

(2) The term "new source" means a stationary source the construction or modification of which is commenced after the Administrator proposes regulations under this section establishing an emission standard which will be applicable to such source.

(3) The terms "stationary source", "modification", "owner or operator" and "existing source" shall have the same meaning as such terms have under section 7411(a) of this title.

(b) List of hazardous air pollutants; emission standards; pollution control techniques

(1)(A) The Administrator shall, within 90 days after December 31, 1970, publish (and shall from time to time thereafter revise) a list which includes each hazardous air pollutant for which he intends to establish an emission standard under this section.

(B) Within 180 days after the inclusion of any air pollutant in such list, the Administrator shall publish proposed regulations establishing emission standards for such pollutant together with a notice of a public hearing within thirty days. Not later than 180 days after such publication, the Administrator shall prescribe an emission standard for such pollutant, unless he finds, on the basis of information presented at such hearings, that such pollutant clearly is not a hazardous air pollutant. The Administrator shall establish any such standard at the level which in his judgment provides an ample margin of safety to protect the public health from such hazardous air pollutant.

(C) Any emission standard established pursuant to this section shall become effective upon promulgation.

(2) The Administrator shall, from time to time, issue information on pollution control techniques for air pollutant subject to the provisions of this section.

(c) Prohibited acts; exemption

(1) After the effective date of any emission standard under this section—

(A) no person may construct any new source or modify any existing source which in the Administrator's judgment, will emit an air pollutant to which such standard applies unless the Administrator finds that such source if properly operated will not cause emissions in violation of such standard, and

(B) no air pollutant to which such standard applies may be emitted from any stationary source in violation of such standard, except that in the case of an existing source—

(i) such standard shall not apply until 90 days after its effective date, and

(ii) the Administrator may grant a waiver permitting such source a period of up to two years after the effective date of a standard to comply with the standard, if he finds that such period is necessary for the installation of controls and that steps will be taken during the period of the waiver to assure that the health of persons will be protected from imminent endangerment.

(2) The President may exempt any stationary source from compliance with paragraph (1) for a period of not more than two years if he finds that the technology to implement such standards is not available and the operation of such source is required for reasons of national security. An exemption under this paragraph may be extended for one or more additional periods, each period not to exceed two years. The President shall make a report to Congress with respect to each exemption (or extension thereof) made under this paragraph.

(d) State implementation and enforcement

(1) Each State may develop and submit to the Administrator a procedure for implementing and enforcing emission standards for hazardous air pollutants for stationary sources located in such State. If the Administrator finds the State procedure is adequate, he shall delegate to such State any authority he has under this chapter to implement and enforce such standards.

(2) Nothing in this subsection shall prohibit the Administrator from enforcing any applicable emission standard under this section.

(e) Design, equipment, work practice, and operational standards

(1) For purposes of this section, if in the judgment of the Administrator, it is not feasible to prescribe or enforce an emission standard for control of a hazardous air pollutant or pollutants, he may instead promulgate a design, equipment, work practice, or operational standard, or combination thereof, which in his judgment is adequate to protect the public health from such pollutant or pollutants with an ample margin of safety. In the event the Administrator promulgates a design or equipment standard under this subsection, he shall include a part of such standard such requirements as will assure the proper operation and maintenance of any such element of design or equipment.

(2) For the purpose of this subsection, the phrase "not feasible to prescribe or enforce an emission standard" means any situation in which the Administrator determines that (A) a hazardous pollutant or pollutants cannot

be emitted through a conveyance designed and constructed to emit or capture such pollutant, or that any requirement for, or use of, such a conveyance would be inconsistent with any Federal, State, or local law, or (B) the application of measurement methodology to a particular class of sources is not practicable due to technological or economic limitations.

(3) If after notice and opportunity for public hearing, any person establishes to the satisfaction of the Administrator that an alternative means of emission limitation will achieve a reduction in emissions of any air pollutant at least equivalent to the reduction in emissions of such air pollutant achieved under the requirements of paragraph (1), the Administrator shall permit the use of such alternative by the source for purposes of compliance with this section with respect to such pollutant.

(4) Any standard promulgated under paragraph (1) shall be promulgated in terms of an emission standard whenever it becomes feasible to promulgate and enforce such standard in such terms.

(5) Any design, equipment, work practice, or operational standard, or any combination thereof, described in this subsection shall be treated as an emission standard for purposes of the provisions of this chapter (other than the provisions of this subsection).

(July 14, 1955, ch. 360, title I, § 112, as added Dec. 31, 1970, Pub. L. 91-604, § 4(a), 84 Stat. 1685, and amended Aug. 7, 1977, Pub. L. 95-95, title I, §§ 109(d)(2), 110, title IV, § 401(c), 91 Stat. 701, 703, 791; Nov. 9, 1978, Pub. L. 95-623, § 13 (b), 92 Stat. 3458.)

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§ 7414. Recordkeeping, inspections, monitoring, and entry

(a) Authority of Administrator or authorized representative

For the purpose (i) of developing or assisting in the development of any implementation plan under section 7410 or section 7411(d) of this title, any standard of performance under section 7411 of this title, or any emission standard under section 7412 of this title, (ii) of determining whether any person is in violation of any such standard or any requirement of such a plan, or (iii) carrying out any provision of this chapter (except a provision of subchapter II of this chapter with respect to a manufacturer of new motor vehicles or new motor vehicle engines)—

(1) the Administrator may require any person who owns or operates any emission source or who is subject to any requirement of this chapter (other than a manufacturer subject to the provisions of section 7525(c) or 7542 of this title) with respect to a provision of subchapter II of this chapter to (A) establish and maintain such records, (B) make such reports, (C) install, use, and maintain such monitoring equipment or methods, (D) sample such emissions (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe), and (E) provide such other information as he may reasonably require; and

(2) the Administrator or his authorized representative, upon presentation of his credentials—

(A) shall have a right of entry to, upon, or through any premises of such person or in which any records required to be maintained under paragraph (1) of this section are located, and

(B) may at reasonable times have access to and copy any records, inspect any monitoring equipment or method required under paragraph (1), and sample any emissions which such person is required to sample under paragraph (1).

(b) State enforcement

(1) Each State may develop and submit to the Administrator a procedure for carrying out this section in such State. If the Administrator finds the State procedure is adequate, he may delegate to such State any authority he has to carry out this section.

(2) Nothing in this subsection shall prohibit the Administrator from carrying out this section in a State.

(c) Availability of records, reports, and information to public; disclosure of trade secrets

Any records, reports or information obtained under subsection (a) of this section shall be available to the public, except that upon a showing satisfactory to the Administrator by any person that records, reports, or information, or particular part thereof, (other than emission data) to which the Administrator has access under this section if made public, would divulge methods or processes entitled to protection as trade secrets of such person, the Administrator shall consider such record, report, or information or particular portion thereof confidential in accordance with the purposes of section 1905 of title 18, except that such record, report, or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter or when relevant in any proceeding under this chapter.

(d) Notice of proposed entry, inspection, or monitoring

(1) In the case of any emission standard or limitation or other requirement which is adopted by a State, as part of an applicable implementation plan or as part of an order under section 7413(d) of this title, before carrying out an entry, inspection, or monitoring under paragraph (2) of subsection (a) of this section with respect to such standard, limitation, or other requirement, the Administrator (or his representatives) shall provide the State air pollution control agency with reasonable prior notice of such action, indicating the purpose of such action. No State agency which receives notice under this paragraph of an action proposed to be taken may use the information contained in the notice to inform the person whose property is proposed to be affected of the proposed action. If the Administrator has reasonable basis for believing that a State agency is so using or will so use such information, notice to the agency under this paragraph is not required

until such time as the Administrator determines the agency will no longer so use information contained in a notice under this paragraph. Nothing in this section shall be construed to require notification to any State agency of any action taken by the Administrator with respect to any standard, limitation, or other requirement which is not part of an applicable implementation plan or which was promulgated by the Administrator under section 7410(c) of this title.

(2) Nothing in paragraph (1) shall be construed to provide that any failure of the Administrator to comply with the requirements of such paragraph shall be a defense in any enforcement action brought by the Administrator or shall make inadmissible as evidence in any such action any information or material obtained notwithstanding such failure to comply with such requirements.

(July 14, 1955, ch. 360, title I, § 114, as added Dec. 31, 1970, Pub. L. 91-604, § 4(a), 84 Stat. 1687, and amended June 22, 1974, Pub. L. 93-319, § 6(a)(4), 88 Stat. 259; Aug. 7, 1977, Pub. L. 95-95, title I, §§ 109(d)(3), 113, title III, § 305(d), 91 Stat. 701, 709, 776; Nov. 16, 1977, Pub. L. 95-190, § 14(a)(22), (23), 91 Stat. 1400.)

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§ 7416. Retention of State authority

Except as otherwise provided in sections 1857c-10(c), (e), and (f) (as in effect before August 7, 1977), 7543, 7545(c)(4), and 7573 of this title (preempting certain State regulation of moving sources) nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 7411 or section 7412 of this title, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

(July 14, 1955, ch. 360, title I, § 116, formerly § 109, as added Nov. 21, 1967, Pub. L. 90-148, § 2, 81 Stat. 497, renumbered and amended Dec. 31, 1970, Pub. L. 91-604, § 4(a), (c), 84 Stat. 1678, 1689; June 22, 1974, Pub. L. 93-319, § 6(b), 88 Stat. 259; Nov. 16, 1977, Pub. L. 95-190, § 14(a)(24), 91 Stat. 1400.)

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§ 7418. Control of pollution from Federal facilities

(a) Compliance with requirements, administrative authority, process, and sanctions respecting control and abatement of air pollution

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, and each officer, agent, or employee thereof, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of air pollution in the same manner, and to the same extent as any nongovernmental entity. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law. No officer, agent, or employee of the United States shall be personally liable for any civil penalty for which he is not otherwise liable.

(b) Exemption

The President may exempt any emission source of any department, agency, or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so, except that no exemption may be granted from section 7411 of this title, and an exemption from section 7412 of this title may be granted only in accordance with section 7412(c) of this title. No such exemption shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods of not to exceed one year upon the President's making a new determination. In addition to any such exemption of a particular emission source, the President may, if he determines it to be in the paramount interest of the United States to do so, issue regulations exempting from compliance with the requirements of this section any weaponry, equipment, aircraft, vehicles, or other classes or categories of property which are owned or operated by the Armed Forces of the United States (including the Coast Guard) or by the National Guard of any State and which are uniquely military in nature. The President shall reconsider the need for such regulations at three-year intervals. The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting each such exemption.

(July 14, 1955, ch. 360, title I, § 118, formerly, § 7, as added Dec. 17, 1963, Pub. L. 88-206, § 1, 77 Stat. 399, renumbered § 107, Oct. 20, 1965, Pub. L. 89-272, title I, 101(3), 79 Stat. 992, renumbered § 111 and amended Nov. 21, 1967, Pub. L. 90-148, § 2, 81 Stat. 499, and renumbered § 118 and amended Dec. 31, 1970, Pub. L. 91-604, §§ 4(a), 5, 84 Stat. 1678, 1689; Aug. 7, 1977, Pub. L. 95-95, title I, § 116, 91 Stat. 711.)

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PART B—OZONE PROTECTION

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PART C—PREVENTION OF SIGNIFICANT DETERIORATION OF AIR QUALITY

SUBPART I—CLEAN AIR

§ 7470. Congressional declaration of purpose

The purpose of this part are as follows:

(1) to protect public health and welfare from any actual or potential adverse effect which in the Administrator's judgment may reasonably be anticipate to occur from air pollution or from exposures to pollutants in other media, which pollutants originate as emissions to the ambient air, notwithstanding attainment and maintenance of all national ambient air quality standards;

(2) to preserve, protect, and enhance the air quality in national parks, national wilderness areas, national monuments, national seashores, and other areas of special national or regional natural, recreational, scenic, or historic value;

(3) to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources;

(4) to assure that emissions from any source in any State will not interfere with any portion of the applicable implementation plan to prevent significant deterioration of air quality for any other State; and

(5) to assure that any decision to permit increased air pollution in any area to which this section applies is made only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decisionmaking process.

(July 14, 1955, ch. 360, title I, § 160, as added Aug. 7, 1977, Pub. L. 95-95, title I, § 127(a), 91 Stat. 731.)

§ 7471. Plan requirements

In accordance with the policy of section 7401(b)(1) of this title, each applicable implementation plan shall contain emission limitations and such other measures as may be necessary, as determined under regulations promulgated under this part, to prevent significant deterioration of air quality in each region (or portion thereof) identified pursuant to section 7407(d)(1)(D) or (E) of this title.

(July 14, 1955, ch. 360, title I, § 161, as added Aug. 7, 1977, Pub. L. 95-95, title I, § 127(a), 91 Stat. 731.)

§ 7472. Initial classification

(a) Areas designated as class I

Upon the enactment of this part, all—

(1) international parks.
(2) national wilderness areas which exceed 5,000 acres in size,
(3) national memorial parks which exceed 5,000 acres in size, and
(4) national parks which exceed six thousand acres in size,

and which are in existence on August 7, 1977, shall be class I areas and may not be redesignated. All areas which were redesignated as class I under regulations promulgated before August 7, 1977, shall be class I areas which may be redesignated as provided in this part.

(b) Areas designated as class II

All areas in such State identified pursuant to section 7407(d)(1)(D) or (E) of this title which are not established as class I under subsection (a) of this section shall be class II areas unless redesignated under section 7474 of this title.

(July 14, 1955, ch. 360, title I § 162, as added Aug. 7, 1977, Pub. L. 95-95, title I, § 127(a), 91 Stat. 731, and amended Nov. 16, 1977, Pub. L. 95-190, § 14(a)(40), 91 Stat. 1401.)

§ 7473. Increments and ceilings

(a) Sulfur oxide and particulate matter; requirement that maximum allowable increases and maximum allowable concentrations not be exceeded

In the case of sulfur oxide and particulate matter, each applicable implementation plan shall contain measures assuring that maximum allowable increases over baseline concentrations of, and maximum allowable concentrations of, such pollutant shall not be exceeded. In the case of any maximum allowable increase (except an allowable increase specified under section 7475(d)(2)(C)(iv) of this title) for a pollutant based on concentrations permitted under national ambient air quality standards for any period other than an annual period, such regulations shall permit such maximum allowable increase to be exceeded during one such period per year.

(b) Maximum allowable increases in concentrations over baseline concentrations

(1) For any class I area, the maximum allowable increase in concentrations of sulfur dioxide and particulate matter over the baseline concentration of such pollutants shall not exceed the following amounts:

Pollutant	Maximum allowable increase (in micrograms per cubic meter)
Particulate matter:	
Annual geometric mean	5
Twenty-four-hour maximum	10

Sulfur dioxide:	
Annual arithmetic mean	2
Twenty-four-hour maximum	5
Three-hour maximum	25

(2) For any class II area, the maximum allowable increase in concentrations of sulfur dioxide and particulate matter over the baseline concentration of such pollutants shall not exceed the following amounts:

Pollutant	Maximum allowable increase (in micrograms per cubic meter)
Particulate matter:	
Annual geometric mean	19
Twenty-four-hour maximum	37
Sulfur dioxide:	
Annual arithmetic mean	20
Twenty-four-hour maximum	91
Three-hour maximum	512

(3) For any class III area, the maximum allowable increase in concentrations of sulfur dioxide and particulate matter over the baseline concentration of such pollutants shall not exceed the following amounts:

Pollutant	Maximum allowable increase (in micrograms per cubic meter)
Particulate matter:	
Annual geometrical mean	37
Twenty-four-hour maximum	75
Sulfur dioxide;	
Annual arithmetic mean	40
Twenty-four-hour maximum	182
Three-hour maximum	700

(4) The maximum allowable concentration of any air pollutant in any area to which this part applies shall not exceed a concentration for such pollutant for each period of exposure equal to—

(A) the concentration permitted under the national secondary ambient air quality standard, or

(B) the concentration permitted under the national primary ambient air quality standard,

whichever concentration is lowest for such pollutant for such period of exposure.

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(July 14, 1955, ch. 360, title I, § 163, as added Aug. 7, 1977, Pub. L. 95–95, title I, § 127(a), 91 Stat. 732, and amended Nov. 16, 1977, Pub. L. 95–190, § 14(a)(41), 91 Stat. 1401.)

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§ 7475. Preconstruction requirements

(a) Major emitting facilities on which construction is commenced

No major emitting facility on which construction is commenced after August 7, 1977, may be constructed in any area to which this part applies unless—

(1) a permit has been issued for such proposed facility in accordance with this part setting forth emission limitations for such facility which conform to the requirements of this part;

* * * * *

(d) Action taken on permit applications; notice; adverse impact on air quality related values; variance; emission limitations

(1) Each State shall transmit to the Administrator a copy of each permit application relating to a major emitting facility received by such State and provide notice to the Administrator of every action related to the consideration of such permit.

(2)(A) The Administrator shall provide notice of the permit application to the Federal Land Manager and the Federal official charged with direct responsibility for management of any lands within a class I area which may be affected by emissions from the proposed facility.

(B) The Federal Land Manager and the Federal official charged with direct responsibility for management of such lands shall have an affirmative responsibility to protect the air quality related values (including visibility) of any such lands within a class I area and to consider, in consultation with the Administrator, whether a proposed major emitting facility will have an adverse impact on such values.

(C)(i) In any case where the Federal official charged with direct responsibility for management of any lands within a class I area or the Federal Land Manager of such lands, or the Administrator, or the Governor of an adjacent State containing such a class I area files a notice alleging that emissions from a proposed major emitting facility may cause or contribute to a change in the air quality in such area and identifying the potential adverse impact of such change, a permit shall not be issued unless the owner or operator of such facility demonstrates that emissions of particulate matter and sulfur dioxide will not cause or contribute to concentrations which exceed the maximum allowable increases for a class I area.

(ii) In any case where the Federal Land Manager demonstrates to the satisfaction of the State that the emissions from such facility will have an adverse impact on the air quality-related values (including visibility) of such lands, notwithstanding the fact that the change in air quality resulting from emissions from such facility will not cause or contribute to concentrations which exceed the maximum allowable increases for a class I area, a permit shall not be issued.

(iii) In any case where the owner or operator of such facility demonstrates to the satisfaction of the Federal Land Manager, and the Federal Land

Manager so certifies, that the emissions from such facility will have no adverse impact on the air quality-related values of such lands (including visibility), notwithstanding the fact that the change in air quality resulting from emissions from such facility will cause or contribute to concentrations which exceed the maximum allowable increases for class I areas, the State may issue a permit.

(iv) In the case of a permit issued pursuant to clause (iii), such facility shall comply with such emission limitations under such permit as may be necessary to assure that emissions of sulfur oxides and particulates from such facility will not cause or contribute to concentrations of such pollutant which exceed the following maximum allowable increases over the baseline concentration for such pollutants:

	Maximum allowable increase (in micrograms per cubic meter)
Particulate matter:	
Annual geometric mean	19
Twenty-four-hour maximum	37
Sulfur dioxide:	
Annual arithmetic mean	20
Twenty-four-hour maximum	91
Three-hour maximum	325

(D)(i) In any case where the owner or operator of a proposed major emitting facility who has been denied a certification under subparagraph (C)(ii) demonstrates to the satisfaction of the Governor, after notice and public hearing, and the Governor finds, that the facility cannot be constructed by reason of any maximum allowable increase for sulfur dioxide for periods of twenty-four hours or less applicable to any class I area and, in the case of Federal mandatory class I areas, that a variance under this clause will not adversely affect the air quality related values of the area (including visibility), the Governor, after consideration of the Federal Land Manager's recommendation (if any) and subject to his concurrence, may grant a variance from such maximum allowable increase. If such variance is granted, a permit may be issued to such source pursuant to the requirements of this subparagraph.

(ii) In any case in which the Governor recommends a variance under this subparagraph in which the Federal Land Manager does not concur, the recommendations of the Governor and the Federal Land Manager shall be transmitted to the President. The President may approve the Governor's recommendation if he finds that such variance is in the national interest. No Presidential finding shall be reviewable in any court. The variance shall take effect if the President approves the Governor's recommendations. The President shall approve or disapprove such recommendation within ninety days after his receipt of the recommendations of the Governor and the Federal Land Manager.

(iii) In the case of a permit issued pursuant to this subparagraph, such facility shall comply with such emission limitations under such permit as may be necessary to assure that emissions of sulfur oxides from such facility will not (during any day on which the otherwise applicable maximum allowable increases are exceeded) cause or contribute to concentrations which exceed the following maximum allowable increases for such areas over the baseline concentration for such pollutant and to assure that such emissions will not cause or contribute to concentrations which exceed the otherwise applicable maximum allowable increases for periods of exposure of 24 hours or less on more than 18 days during any annual period.

MAXIMUM ALLOWABLE INCREASE

(In micrograms per cubic meter)

Period of exposure	Low terrain areas	High terrain areas
24-hr maximum	36	62
3-hr maximum	130	221

(iv) For purposes of clause (iii), the term "high terrain area" means with respect to any facility, any area having an elevation of 900 feet or more above the base of the stack of such facility, and the term "low terrain area" means any area other than a high terrain area.

* * * * *

(July 14, 1955, ch. 360, title I, § 165, as added Aug. 7, 1977, Pub. L. 95-95, title I, § 127(a), 91 Stat. 735, and amended Nov. 16, 1977, Pub. L. 95-190, § 14(a)(44)-(51), 91 Stat. 1402.)

§ 7476. Other pollutants

(a) Hydrocarbons, carbon monoxide, petrochemical oxidants, and nitrogen oxides

In the case of the pollutants hydrocarbons, carbon monoxide, photochemical oxidants, and nitrogen oxides, the Administrator shall conduct a study and not later than two years after August 7, 1977, promulgate regulations to prevent the significant deterioration of air quality which would result from the emissions of such pollutants. In the case of pollutants for which national ambient air quality standards are promulgated after August 7, 1977, he shall promulgate such regulations not more than 2 years after the date of promulgation of such standards.

(b) Effective date of regulations

Regulations referred to in subsection (a) of this section shall become effective one year after the date of promulgation. Within 21 months after such date of promulgation such plan revision shall be submitted to the Administrator who shall approve or disapprove the plan within 25 months after such date or promulgation in the same manner as required under section 7410 of this title.

(c) Contents of regulations

Such regulations shall provide specific numerical measures against which permit applications may be evaluated, a framework for stimulating improved control technology, protection of air quality values, and fulfill the goals and purposes set forth in section 7401 and section 7470 of this title.

(d) Specific measures to fulfill goals and purposes

The regulations of the Administrator under subsection (a) of this section shall provide specific measures at least as effective as the increments established in section 7473 of this title to fulfill such goals and purposes, and may contain air quality increments, emission density requirements, or other measures.

(e) Area classification plan not required

With respect to any air pollutant for which a national ambient air quality standard is established other than sulfur oxides or particulate matter, an area classification plan shall not be required under this section if the implementation plan adopted by the State and submitted for the Administrator's approval or promulgated by the Administrator under section 7410(c) of this title contains other provisions which when considered as a whole, the Administrator finds will carry out the purposes in section 7470 of this title at least as effectively as an area classification plan for such pollutant. Such other provisions referred to in the preceding sentence need not require the establishment of maximum allowable increases with respect to such pollutant for any area to which this section applies.
(July 14, 1955, ch. 360, title I, § 166, as added Aug. 7, 1977, Pub. L. 95–95, title I, § 127(a), 91 Stat. 739.)

* * * * *

§ 7491. Visibility protection for Federal class I areas

(a) Impairment of visibility; list of areas; study and report

(1) Congress hereby declares as a national goal the prevention of any future, and the remedying of any existing, impairment of visibility in mandatory class I Federal areas which impairment results from manmade air pollution.

(2) Not later than six months after August 7, 1977, the Secretary of the Interior in consultation with other Federal land managers shall review all mandatory class I Federal areas and identify those where visibility is an important value of the area. From time to time the Secretary of the Interior may revise such identifications. Not later than one year after August 7, 1977, the Administrator shall, after consultation with the Secretary of the Interior, promulgate a list of mandatory class I Federal areas in which he determines visibility is an important value.

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(3) Not later than eighteen months after August 7, 1977, the Administrator shall complete a study and report to Congress on available methods for implementing the national goal set forth in paragraph (1). Such report shall include recommendations for—

(A) methods for identifying characterizing, determining, quantifying, and measuring visibility impairment in Federal areas referred to in paragraph (1), and

(B) modeling techniques (or other methods) for determining the extent to which manmade air pollution may reasonably be anticipated to cause or contribute to such impairment, and

(C) methods for preventing and remedying such manmade air pollution and resulting visibility impairment.

Such report shall also identify the classes or categories of sources and the types of air pollutants which, alone or in conjunction with other sources or pollutants, may reasonably be anticipated to cause or contribute significantly to impairment of visibility.

(4) Not later than twenty-four months after August 7, 1977, and after notice and public hearing, the Administrator shall promulgate regulations to assure (A) reasonable progress toward meeting the national goal specified in paragraph (1), and (B) compliance with the requirements of this section.
(July 14, 1955, ch. 360, title I, § 169A, as added Aug. 7, 1977, Pub. L. 95–95, title I, § 128, 91 Stat. 742.)

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PART D—PLAN REQUIREMENTS FOR NONATTAINMENT AREAS

§ 7501. Definitions

For the purpose of this part and section 7410(a)(2)(I) of this title—

* * * * *

(2) The term "nonattainment area" means, for any air pollutant an area which is calculated by air quality modeling (or other methods determined by the Administrator to be reliable) to exceed any national ambient air quality standard for such pollutant. Such term includes any area identified under subparagraphs (A) through (C) of section 7407(d)(1) of this title.

* * * * *

(July 14, 1955, ch. 360, title I, § 171, as added Aug. 7, 1977, Pub. L. 95–95, title I, § 129(b), 91 Stat. 746.)

§ 7502. Nonattainment plan provisions

(a) Expeditious attainment of national ambient air quality standards

(1) The provisions of an applicable implementation plan for a State relating to attainment and maintenance of national ambient air quality stan-

dards in any nonattainment area which are required by section 7410(a)(2)(I) of this title as a precondition for the construction or modification of any major stationary source in any such area on or after July 1, 1979, shall provide for attainment of each such national ambient air quality standard in each such area as expeditiously as practicable, but, in the case of national primary ambient air quality standards, not later than December 31, 1982.

(2) In the case of the national primary ambient air quality standard for photochemical oxidants or carbon monoxide (or both) if the State demonstrates to the satisfaction of the Administrator (on or before the time required for submission of such plan) that such attainment is not possible in an area with respect to either or both of such pollutants within the period prior to December 31, 1982, despite the implementation of all reasonably available measures, such provisions shall provide for the attainment of the national primary standard for the pollutant (or pollutants) with respect to which such demonstration is made, as expeditiously as practicable but not later than December 31, 1987.

* * * * *

(July 14, 1955, ch. 360, title I, § 172, as added Aug. 7, 1977, Pub. L. 95–95, title I, § 129(b), 91 Stat. 746, and amended Nov. 16, 1977, Pub. L. 95–190, § 14(a)(55), (56), 91 Stat. 1402.)

* * * * *

§ 7506. Limitations on certain Federal assistance

* * * * *

(c) Activities not conforming to approved or promulgated plans

No department, agency, or instrumentality of the Federal Government shall (1) engage in, (2) support in any way or provide financial assistance for, (3) license or permit, or (4) approve, any activity which does not conform to a plan after it has been approved or promulgated under section 7410 of this title. No metropolitan planning organization designated under section 134 of title 23, shall give its approval to any project, program, or plan which does not conform to a plan approved or promulgated under section 7410 of this title. The assurance of conformity to such a plan shall be an affirmative responsibility of the head of such department, agency, or instrumentality.

* * * * *

(July 14, 1955, ch. 360, title I, § 176, as added Aug. 7, 1977, Pub. L. 95-95, title I, § 129(b), 91 Stat. 749, and amended Nov. 16, 1977, Pub. L. 95-190, § 14(a)(59), 91 Stat. 1403.)

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SUBCHAPTER II—EMISSION STANDARDS FOR MOVING SOURCES

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SUBCHAPTER III—GENERAL PROVISIONS

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§ 7602. Definitions

When used in this chapter—

(a) The term "Administrator" means the Administrator of the Environmental Protection Agency.

(b) The term "air pollution control agency" means any of the following:

(1) A single State agency designated by the Governor of that State as the official State air pollution control agency for purposes of this chapter;

(2) An agency established by two or more States and having substantial powers or duties pertaining to the prevention and control of air pollution;

(3) A city, county, or other local government health authority, or, in the case of any city, county, or other local government in which there is an agency other than the health authority charged with responsibility for enforcing ordinances or laws relating to the prevention and control of air pollution, such other agency; or

(4) An agency of two or more municipalities located in the same State or in different States and having substantial powers or duties pertaining to the prevention and control of air pollution.

(c) The term "interstate air pollution control agency" means—

(1) an air pollution control agency of two or more municipalities located in different States, or

(2) an air pollution control agency of two or more municipalities located in different States.

(d) The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa and includes the Commonwealth of the Northern Mariana Islands.

(e) The term "person" includes an individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any agency, department, or instrumentality of the United States and any officer, agent, or employee thereof.

(f) The term "municipality" means a city, town, borough, county, parish, district, or other public body created by or pursuant to State law.

(g) The term "air pollutant" means any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air.

(h) All language referring to effects on welfare includes, but is not limited to, effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being.

(i) The term "Federal land manager" means, with respect to any lands in the United States, the Secretary of the department with authority over such lands.

(j) Except as otherwise expressly provided, the terms "major stationary source" and "major emitting facility" mean any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant (including any major emitting facility or source of fugitive emissions of any such pollutant, as determined by rule by the Administrator).

(k) The terms "emission limitation" and "emission standard" mean a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction.

(l) The term "standard of performance" means a requirement of continuous emission reduction, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction.

(m) The term "means of emission limitation" means a system of continuous emission reduction (including the use of specific technology or fuels with specified pollution characteristics).

(n) The term "primary standard attainment date" means the date specified in the applicable implementation plan for the attainment of a national primary ambient air quality standard for any air pollutant.

(o) The term "delayed compliance order" means an order issued by the State or by the Administrator to an existing stationary source, postponing the date required under an applicable implementation plan for compliance by such source with any requirement of such plan.

(p) The term "schedule and timetable of compliance" means a schedule of required measures including an enforceable sequence of actions or operations leading to compliance with an emission limitation, other limitation, prohibition, or standard.

(July 14, 1955, ch. 360, title III, § 302, formerly § 9, as added Dec. 17, 1963, Pub. L. 88-206, § 1, 77 Stat. 400, renumbered Oct. 20, 1965, Pub. L. 89-272, title I, § 101(4), 79 Stat. 992, and amended Nov. 21, 1967, Pub. L. 90-148, § 2, 81 Stat. 504; Dec. 31, 1970, Pub. L. 91-604, § 15(a)(1), (c)(1), 84 Stat. 1710, 1713; Aug. 7, 1977, Pub. L. 95-95, title II, § 218(c), title III, § 301, 91 Stat. 761, 769; Nov. 16, 1977, Pub. L. 95-190, § 14(a)(76), 91 Stat. 1404.)

* * * * *

§ 7606. Federal procurement

(a) Contracts with violators prohibited

No Federal agency may enter into any contract with any person who is convicted of any offense under section 7413(c)(1) of this title for the procurement of goods, materials, and services to perform such contract at any facility at which the violation which gave rise to such conviction occurred if such facility is owned, leased, or supervised by such person. The prohibition in the preceding sentence shall continue until the Administrator certifies that the condition giving rise to such a conviction has been corrected.

(b) Notification procedures

the Administrator shall establish procedures to provide all Federal agencies with the notification necessary for the purposes of subsection (a) of this section.

(c) Federal agency contracts

In order to implement the purposes and policy of this chapter to protect and enhance the quality of the Nation's air, the President shall, not more than 180 days after December 31, 1970, cause to be issued an order (1) requiring each Federal agency authorized to enter into contracts and each Federal agency which is empowered to extend Federal assistance by way of grant, loan, or contract to effectuate the purpose and policy of this chapter in such contracting or assistance activities, and (2) setting forth procedures, sanctions, penalties, and such other provisions, as the President determines necessary to carry out such requirement.

(d) Exemptions; notification to Congress

The President may exempt any contract, loan, or grant from all part of the provisions of this section where he determines such exemption is necessary in the paramount interest of the United States and he shall notify the Congress of such exemption.

(e) Annual report to Congress

The President shall annually report to the Congress on measures taken toward implementing the purpose and intent of this section, including but not limited to the progress and problems associated with implementation of this section.
(July 14, 1955, ch. 360, title III, § 306, as added Dec. 31, 1970, Pub. L. 91-604, § 12(a), 84 Stat. 1707.)

* * * * *

§ 7610. Other authority

(a) Authority and responsibilities under other laws not affected

Except as provided in subjection (b) of this section, this chapter shall not be construed as superseding or limiting the authorities and responsibilities, under any other provision of law, of the Administrator or any other Federal officer, department, or agency.

(b) Nonduplication of appropriations

No appropriation shall be authorized or made under section 241, 243, or 246 of this title for any fiscal year after the fiscal year ending June 30, 1964, for any purpose for which appropriations may be made under authority of this chapter.

(July 14, 1955, ch. 360, title III, § 310, formerly § 10, as added Dec. 17, 1963, Pub. L. 88-260, § 1, 77 Stat. 401, renumbered § 303, Oct. 20, 1965, Pub. L. 89-272, title I, § 101(4), 79 Stat. 992, and amended Nov. 21, 1967, Pub. L. 90-148, § 2, 81 Stat. 505; renumbered § 310, and amended Dec. 31, 1970, Pub. L. 91-604, §§ 12(a), 15(c)(2), 84 Stat. 1705, 1713.)

SUBCHAPTER IV—NOISE POLLUTION

§ 7641. Noise abatement

(a) Office of Noise Abatement and Control

The Administrator shall establish within the Environmental Protection Agency an Office of Noise Abatement and Control, and shall carry out through such Office a full and complete investigation and study of noise and its effect on the public health and welfare in order to (1) identify and classify causes and sources of noise, and (2) determine—

(A) effects at various levels;

(B) projected growth of noise levels in urban areas through the year 2000;

(C) the psychological and physiological effect on humans;

(D) effects of sporadic extreme noise (such as jet noise near airports) as compared with constant noise;

(E) effect on wildlife and property (including values);

(F) effect of sonic booms on property (including values); and

(G) such other matters as may be of interest in the public welfare.

(b) Investigation techniques; report and recommendations

In conducting such investigation, the Administrator shall hold public hearings, conduct research, experiments, demonstrations, and studies. The Administrator shall report the results of such investigation and study, together with his recommendations for legislation or other action, to the President and the Congress not later than one year after December 31, 1970.

(c) Abatement of noise from Federal activities

In any case where any Federal department or agency is carrying out or sponsoring any activity resulting in noise which the Administrator determines amounts to a public nuisance or is otherwise objectionable, such department or agency shall consult with the Administrator to determine possible means of abating such noise.

(July 14, 1955, ch. 360, title IV, § 402, as added Dec. 31, 1970, Pub. L. 91-604, § 14, 84 Stat. 1709.)

TITLE 44, U.S. CODE—PUBLIC PRINTING AND DOCUMENTS

This title was enacted by Pub. L. 90-620, § 1, Oct. 22, 1968, 82 Stat. 1238.

CHAPTER 15—FEDERAL REGISTER AND CODE OF FEDERAL REGULATIONS

§ 1501. Definitions

As used in this chapter, unless the context otherwise requires—

"document" means a Presidential proclamation or Executive order and an order, regulation, rule, certificate, code of fair competition, license, notice, or similar instrument, issued, prescribed, or promulgated by a Federal agency;

"Federal agency" or "agency" means the President of the United States, or an executive department, independent board, establishment, bureau, agency, institution, commission, or separate office of the administrative branch of the Government of the United States but not the legislative or judicial branches of the Government;

"person" means an individual, partnership, association, or corporation; and

"National Archives of the United States" has the same meaning as in section 2901(11) of this title.

(Pub. L. 90-620, Oct. 22, 1968, 82 Stat. 1273; Pub. L. 98-497, title I, § 107(b)(2), Oct. 19, 1984, 98 Stat. 2286.)

§ 1502. Custody and printing of Federal documents; appointment of Director

The Archivist of the United States, acting through the Office of the Federal Register, is charged with the custody and, together with the Public Printer, with the prompt and uniform printing and distribution of the documents required or authorized to be published by section 1505 of this title. There shall be at the head of the Office a director, appointed by, and who shall under the general direction of, the Archivist of the United States in carrying out this chapter and the regulations prescribed under it.

(Pub. L. 90-620, Oct. 22, 1968, 82 Stat. 1273; Pub. L. 98-497, title I, § 107(b)(3), Oct. 19, 1984, 98 Stat. 2287.)

* * * * *

§ 1505. Documents to be published in Federal Register

(a) Proclamation and Executive Orders; documents having general applicability and legal effect; documents required to be published by Congress

There shall be published in the Federal Register—

(1) Presidential proclamations and Executive orders, except those not having general applicability and legal effect or effective only against Federal agencies or persons in their capacity as officers, agents, or employees thereof;

(2) documents or classes of documents that the President may determine from time to time have general applicability and legal effect; and

(3) documents or classes of documents that may be required so to be published by Act of Congress.

For the purpose of this chapter every document or order which prescribes a penalty has general applicability and legal effect.

(b) Documents authorized to be published by regulations; comments and news items excluded

In addition to the foregoing there shall also be published in the Federal Register other documents or classes of documents authorized to be published by regulations prescribed under this chapter with the approval of the President, but comments or news items of any character may not be published in the Federal Register.

* * * * *

(Pub. L. 90-620, Oct.22, 1968, 82 Stat. 1274.)

* * * * *

§ 1507. Filing document as constructive notice; publication in Federal Register as presumption of validity; judicial notice; citation

A document required by section 1505(a) of this title to be published in the Federal Register is not valid as against a person who has not had actual knowledge of it until the duplicate originals or certified copies of the document have been filed with the Office of the Federal Register and a copy made available for public inspection as provided by section 1503 of this title. Unless otherwise specifically provided by statute, filing of a document, required or authorized to be published by section 1505 of this title, except in cases where notice by publication is insufficient in law, is sufficient to give notice of the contents of the document to a person subject to or affected by it. The publication in the Federal Register of a document creates a rebuttable presumption—

(1) that it was duly issued, prescribed, or promulgated;

(2) that it was filed with the Office of the Federal Register and made available for public inspection at the day and hour stated in the printed notation;

(3) that the copy contained in the Federal Register is a true copy of the original; and

(4) that all requirements of this chapter and the regulations prescribed under it relative to the document have been complied with.

The contents of the Federal Register shall be judicially noticed and without prejudice to any other mode of citation, may be cited by volume and page number.

(Pub. L. 90-620, Oct. 22, 1968, 82 Stat. 1276.)

§ 1508. Publication in Federal Register as notice of hearing

A notice of hearing or of opportunity to be heard, required or authorized to be given by an Act of Congress, or which may otherwise properly be given, shall be deemed to have been given to all persons residing within the States of the Union and the District of Columbia, except in cases where notice by publication is insufficient in law, when the notice is published in the Federal Register at such a time that the period between the publication and the date fixed in the notice for the hearing or for the termination of the opportunity to be heard is—

(1) not less than the time specifically prescribed for the publication of the notice by the appropriate Act of Congress; or

(2) not less than fifteen days when time for publication is not specifically prescribed by the Act, without prejudice, however, to the effectiveness of a notice of less than fifteen days where the shorter period is reasonable.

(Pub. L. 90-620, Oct. 22, 1968, 82 Stat. 1276.)

* * * * *

§ 1510. Code of Federal Regulations

(a) The Administrative Committee of the Federal Register, with the approval of the President, may require, from time to time as it considers necessary, the preparation and publication in special or supplemental editions of the Federal Register of complete codifications of the documents of each agency of the Government having general applicability and legal effect, issued or promulgated by the agency by publication in the Federal Register or by filing with the Administrative Committee, and are relied upon by the agency as authority for, or are invoked or used by it in the discharge of, its activities or functions, and are in effect as to facts arising on or after dates specified by the Administrative Committee.

(b) A codification published under subsection (a) of this section shall be printed and bound in permanent form and shall be designated as the "Code of Federal Regulations." The Administrative Committee shall regulate the binding of the printed codifications into separate books with a view to practical usefulness and economical manufacture. Each book shall contain an explanation of its coverage and other aids to users that the Administrative Committee may require. A general index to the entire Code of Federal Regulations shall be separately printed and bound.

(c) The Administrative Committee shall regulate the supplementation and the collation and republication of the printed codifications with a view to keeping the Code of Federal Regulations as current as practicable. Each book shall be either supplemented or collated and republished at least once each calendar year.

(d) The Office of the Federal Register shall prepare and publish the codifications, supplements, collations, and indexes authorized by this section.

(e) The codified documents of the several agencies published in the supplemental edition of the Federal Register under this section, as amended by documents subsequently filed with the Office and published in the daily issues of the Federal Register shall be prima facie evidence of the text of the documents and of the fact that they are in effect on and after the date of publication.

(f) The Administrative Committee shall prescribe, with the approval of the President, regulations for carrying out this section.

(g) This section does not require codification of the text of Presidential documents published and periodically compiled in supplements to Title 3 of the Code of Federal Regulations.

(Pub. L. 90-620, Oct. 22, 1968, 82 Stat. 1277.)

* * * * *

CHAPTER 31—RECORDS MANAGEMENT BY FEDERAL AGENCIES

§ 3101. Records management by agency heads; general duties

The head of each Federal agency shall make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency and designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency's activities.

(Pub. L. 90-620, Oct. 22, 1968, 82 Stat. 1297.)

§ 3102. Establishment of program of management

The head of each Federal agency shall establish and maintain an active, continuing program for the economical and efficient management of the records of the agency. The program, among other things, shall provide for

(1) effective controls over the creation and over the maintenance and use of records in the conduct of current business;

(2) cooperation with the Administrator of General Services and the Archivist in applying standards, procedures, and techniques designed to improve the management of records, promote the maintenance and security of records deemed appropriate for preservation, and facilitate the segregation and disposal of records of temporary value; and

(3) compliance with sections 2101-2117, 2501-2507, 2901-2909, and 3101-3107, of this title and the regulations issued under them.

(Pub. L. 90-620, Oct. 22, 1968, 82 Stat. 1298; Pub. L. 94-575, § 3(a)(1), (2), Oct. 21, 1976, 90 Stat. 2726; Pub. L. 98-497, title I, § 107(b)(19), Oct. 19, 1984, 98 Stat. 2290.)

§ 3103. Transfer of records to records centers

When the head of a Federal agency determines that such action may affect substantial economies or increased operating efficiency, he shall provide for the transfer of records to a records center maintained and operated by the Archivist, or, when approved by the Archivist, to a center maintained and operated by the head of the Federal agency.

(Added Pub. L. 94-575, § 3(a)(3), Oct. 21, 1976, 90 Stat. 2726; Pub. L. 98-497, title I, § 107(b)(20), Oct. 19, 1984, 98 Stat. 2290.)

EXPLANATORY NOTE

Cross Reference, National Archives. Federal agency records of historical or other value also may be transferred to the National Archives of the United States. See 44 U.S.C. § 2107.

§ 3104. Certification and determination on transferred records

An official of the Government who is authorized to certify to facts on the basis of records in his custody, may certify to facts on the basis of records that have been transferred by him or his predecessors to the Archivist, and may authorize the Archivist to certify to facts and to make administrative determinations on the basis of records transferred to the Archivist, notwithstanding any other law.

(Pub. L. 90-620, Oct. 22, 1968, 82 Stat. 1298; Pub. L. 98-497, title I, § 107(b)(21), Oct. 19, 1984, 98 Stat. 2290.)

§ 3105. Safeguards

The head of each Federal agency shall establish safeguards against the removal or loss of records he determines to be necessary and required by regulations of the Archivist. Safeguards shall include making it known to officials and employees of the agency—

(1) that records in the custody of the agency are not to be alienated or destroyed except in accordance with sections 3301–3314 of this title, and

(2) the penalties provided by law for the unlawful removal or destruction of records.

(Pub. L. 90–620, Oct. 22, 1968, 82 Stat. 1298; Pub. L. 98–497, title I. § 107(b)(22), Oct. 19, 1984, 98 Stat. 2290.)

§ 3106. Unlawful removal, destruction of records

The head of each Federal agency shall notify the Archivist of any actual, impending, or threatened unlawful removal, defacing, alteration, or destruction of records in the custody of the agency of which he is the head

that shall come to his attention, and with the assistance of the Archivist shall initiate action through the Attorney General for the recovery of records he knows or has reason to believe have been unlawfully removed from his agency, or from another Federal agency whose records have been transferred to his legal custody. In any case in which the head of the agency does not initiate an action for such recovery or other redress within a reasonable period of time after being notified of any such unlawful action, the Archivist shall request the Attorney General to initiate such an action, and shall notify the Congress when such a request has been made.
(Pub. L. 90-620, Oct. 22, 1968, 82 Stat, 1298; Pub. L. 98-497, title I, § 107(b)(21), title II, § 203(b), Oct. 19, 1984, 98 Stat. 2290, 2294.)

§ 3107. Authority of Comptroller General

Chapters 21, 25, 27, 29, and 31 of this title do not limit the authority of the Comptroller General of the United States with respect to prescribing accounting systems, forms, and procedures, or lessen the responsibility of collecting and disbursing officers for rendition of their accounts for settlement by the General Accounting Office.
(Pub. L. 90-620, Oct. 22, 1968, 82 Stat. 1298; Pub. L. 94-575, § 3(a)(4), Oct. 21, 1976, 90 Stat. 2726.)

CHAPTER 33—DISPOSAL OF RECORDS

§ 3301. Definition of records

As used in this chapter, "records" includes all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them. Library and museum material made or acquired and preserved solely for reference or exhibition purposes, extra copies of documents preserved only for convenience of reference, and stocks of publications and of processed documents are not included.
(Pub. L. 90-620, Oct. 22, 1968, 82 Stat. 1299; Pub. L. 94-575, § 4(c)(2), Oct. 21, 1976, 90 Stat. 2727.)

§ 3302. Regulations covering lists of records for disposal, procedure for disposal, and standards for reproduction

The Archivist shall promulgate, regulations, not inconsistent with this chapter, establishing—

(1) procedures for the compiling and submitting to him of lists and schedules of records proposed for disposal,

(2) procedures for the disposal of records authorized for disposal, and

(3) standards for the reproduction of records by photographic or microphotographic processes with a view to the disposal of the original records.

(Pub. L. 90–620, Oct. 22, 1968, 82 Stat. 1299; Pub. L. 94–575, § 4(c)(1), Oct. 21, 1976, 90 Stat. 2727; Pub. L. 98–497, title I, § 107(b)(23), Oct. 19, 1984, 98 Stat. 2290.)

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§ 3309. Preservation of claims of Government until settled in General Accounting Office; disposal authorized upon written approval of Comptroller General

Records pertaining to claims and demands by or against the Government of the United States or to accounts in which the Government of the United States is concerned, either as debtor or creditor, may not be disposed of by the head of an agency under authorization granted under this chapter, until the claims, demands, and accounts have been settled and adjusted in the General Accounting Office, except upon the written approval of the Comptroller General of the United States.

(Pub. L. 90–620, Oct. 22, 1968, 82 Stat. 1301; Pub. L. 91–287, § 2(b), June 23, 1970, 84 Stat. 321.)

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§ 3314. Procedures for disposal of records exclusive

The procedures prescribed by this chapter are exclusive, and records of the United States Government may not be alienated or destroyed except under this chapter.

(Pub. L. 90–620, Oct. 22, 1968, 82 Stat. 1302.)

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CHAPTER 35—COORDINATION OF FEDERAL INFORMATION POLICY

§ 3501. Purpose

The purpose of this chapter is—

(1) to minimize the Federal paperwork burden for individuals, small businesses, State and local governments, and other persons;

(2) to minimize the cost to the Federal Government of collecting, maintaining, using, and disseminating information;

(3) to maximize the usefullness of information collected by the Federal Government;

(4) to coordinate, integrate and, to the extent practicable and appropriate, make uniform Federal information policies and practices;

(5) to ensure that automatic data processing and telecommunications technologies are acquired and used by the Federal Government in a man-

ner which improves service delivery and program management, increases productivity, reduces waste and fraud, and, wherever practicable and appropriate, reduces the information processing burden for the Federal Government and for persons who provide information to the Federal Government; and

(6) to ensure that the collection, maintenance, use and dissemination of information by the Federal Government is consistent with applicable laws relating to confidentiality, including section 552a of title 5, United States Code, known as the Privacy Act.

(Added Pub. L. 96–511, § 2(a), Dec. 11, 1980, 94 Stat. 2812.)

EXPLANATORY NOTE

Short Title. Section 1 of Public Law 96–511, 94 Stat. 2812, which enacted chapter 35 (sections 3501 through 3520) of title 44, provided that the Act may be cited as the "Paperwork Reduction Act of 1980."

§ 3502. Definitions

As used in this chapter—

(1) the term "agency" means any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency, but does not include the General Accounting Office, Federal Election Commission, the governments of the District of Columbia and of the territories and possessions of the United States, and their various subdivisions, or Government-owned contractor-operated facilities including laboratories engaged in national defense research and production activities;

(2) the terms "automatic data processing," "automatic data processing equipment," and "telecommunications" do not include any data processing or telecommunications system or equipment, the function, operation or use of which—

(A) involves intelligence activities;

(B) involves cryptologic activities related to national security;

(C) involves the direct command and control of military forces;

(D) involves equipment which is an integral part of a weapon or weapons system; or

(E) is critical to the direct fulfillment of military or intelligence missions, provided that this exclusion shall not include automatic data processing or telecommunications equipment used for routine administrative and business applications such as payroll, finance, logistics, and personnel management;

(3) the term "burden" means the time, effort, or financial resources expended by persons to provide information to a Federal agency;

(4) the term "collection of information" means the obtaining or soliciting of facts or opinions by an agency through the use of written report forms, application forms, schedules, questionnaires, reporting or recordkeeping requirements, or other similar methods calling for either—

(A) answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons, other than agencies, instrumentalities, or employees of the United States; or

(B) answers to questions posed to agencies, instrumentalities, or employees of the United States which are to be used for general statistical purposes;

(5) the term "data element" means a distinct piece of information such as a name, term, number, abbreviation, or symbol;

(6) the term "data element dictionary" means a system containing standard and uniform definitions and cross references for commonly used data elements;

(7) the term "data profile" means a synopsis of the questions contained in an information collection request and the official name of the request, the location of information obtained or to be obtained through the request, a description of any compilations, analyses, or reports derived or to be derived from such information, any record retention requirements associated with the request, the agency responsible for the request, the statute authorizing the request, and any other information necessary to identify, obtain, or use the data contained in such information;

(8) the term "Director" means the Director of the Office of Management and Budget;

(9) the term "directory of information resources" means a catalog of information collection requests, containing a data profile for each request;

(10) the term "independent regulatory agency" means the Board of Governors of the Federal Reserve System, the Commodity Futures Trading Commission, the Consumer Product Safety Commission, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Federal Energy Regulatory Commission, the Federal Home Loan Bank Board, the Federal Maritime Commission, the Federal Trade Commission, the Interstate Commerce Commission, the Mine Enforcement Safety and Health Review Commission, the National Labor Relations Board, the Nuclear Regulatory Commission, the Occupational Safety and Health Review Commission, the Postal Rate Commission, the Securities and Exchange Commission, and any other similar agency designated by statute as a Federal independent regulatory agency or commission;

(11) the Term "information collection request" means a written report form, application form, schedule, questionnaire, reporting or recordkeeping requirement, or other similar method calling for the collection of information;

(12) the term "information referral service" means the function that assists officials and persons in obtaining access to the Federal Information Locator System;

(13) the term "information systems" means management information systems;

(14) the term "person" means an individual, partnership, association, corporation, business trust, or legal representative, an organized group

of individuals, a State, territorial, or local government or branch thereof, or a political subdivision or a State, territory, or local government or a branch of a political subdivision;

(15) the term "practical utility" means the ability of an agency to use information it collects, particularly the capability to process such information in a timely and useful fashion; and

(16) the term "recordkeeping requirement" means requirement imposed by an agency on persons to maintain specified records.

(Added Pub. L. 96–511. § 2(a), Dec. 11, 1980, 94 Stat. 2813; Pub. L. 98–443,§ 9(h), Oct. 4, 1984, 98 Stat. 1708.)

§ 3503. Office of Information and Regulatory Affairs

(a) There is established in the Office of Management and Budget an office to be known as the Office of Information and Regulatory Affairs.

(b) There shall be at the head of the Office an Administrator who shall be appointed by, and who shall report directly to, the Director. The Director shall delegate to the Administrator the authority to administer all functions under this chapter, except that any such delegation shall not relieve the Director of responsibility for the administration of such functions. The Administrator shall serve as principal adviser to the Director on Federal information policy.

(Added Pub. L. 96–511, § 2(a), Dec. 11, 1980, 94 Stat. 2814.)

§ 3504. Authority and functions of Director

(a) The Director shall develop and implement Federal information policies, principles, standards, and guidelines and shall provide direction and oversee the review and approval of information collection requests, the reduction of the paperwork burden, Federal statistical activities, records management activities, privacy of records, interagency sharing of information, and acquisition and use of automatic data processing telecommunications, and other technology for managing information resources. The authority under this section shall be exercised consistent with applicable law.

(b) The general information policy functions of the Director shall include—

(1) developing and implementing uniform and consistent information resources management policies and overseeing the development of information management principles, standards, and guidelines and promoting their use;

(2) initiating and reviewing proposals for changes in legislation, regulations, and agency procedures to improve information practices, and informing the President and the Congress on the progress made therein;

(3) coordinating, through the review of budget proposals and as otherwise provided in this section, agency information practices;

(4) promoting, through the use of the Federal Information Locator System, the review of budget proposals and other methods, greater sharing of information by agencies;

(5) evaluating agency information management practices to determine their adequacy and efficiency, and to determine compliance of such practices with the policies, principles, standards, and guidelines promulgated by the Director; and

(6) overseeing planning for, and conduct of research with respect to, Federal collection, processing, storage, transmission, and use of information.

(c) The information collection request clearance and other paperwork control functions of the Director shall include—

(1) reviewing and approving information collection requests proposed by agencies;

(2) determining whether the collection of information by an agency is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility for the agency;

(3) ensuring that all information collection requests—

(A) are inventoried, display a control number and, when appropriate, an expiration data;

(B) indicate the request is in accordance with the clearance requirements of section 3507; and

(C) contain a statement to inform the person receiving the request why the information is being collected, how it is to be used, and whether responses to the request are voluntary, required to obtain a benefit, or mandatory;

(4) designating as appropriate, in accordance with section 3509, a collection agency to obtain information for two or more agencies;

(5) setting goals for reduction of the burdens of Federal information collection requests;

(6) overseeing action on the recommendations for the Commission on Federal Paperwork; and

(7) designing and operating, in accordance with section 3511, the Federal Information Locator System.

(d) The statistical policy and coordination functions of the Director shall include—

(1) developing long range plans for the improved performance of Federal statistical activities and programs;

(2) coordinating, through the review of budget proposals and as otherwise provided in this section, the functions of the Federal Government with respect to gathering, interpreting, and disseminating statistics and statistical information;

(3) developing and implementing Government-wide policies, principles, standards, and guidelines concerning statistical collection procedures and methods, statistical data classifications, and statistical information presentation and dissemination; and

(4) evaluating statistical program performance and agency compliance with Government-wide policies, principles, standards, and guidelines.

(e) The records management functions of the Director shall include—

(1) providing advice and assistance to the Archivist in order to promote coordination in the administration of chapters 29, 31, and 33 of this title with the information policies, principles, standards, and guidelines established under this chapter;

(2) reviewing compliance by agencies with the requirements of chapters 29, 31, and 33 of this title and with regulations promulgated by the Archivist thereunder; and

(3) coordinating records management policies and programs with related information programs such as information collection, statistics, automatic data processing and telecommunications, and similar activities.

(f) The privacy functions of the Director shall include—

(1) developing and implementing policies, principles, standards, and guidelines on information disclosure and confidentiality, and on safeguarding the security of information collected or maintained by or on behalf of agencies;

(2) providing agencies with advice and guidance about information security, restriction, exchange, and disclosure; and

(3) monitoring compliance with section 552a of title 5, United States Code, and related information management laws.

(g) The Federal automatic data processing and telecommunications functions of the Director shall include—

(1) developing and implementing policies, principles, standards, and guidelines for automatic data processing and telecommunications functions and activities of the Federal Government, and overseeing the establishment of standards under section 111(f) of the Federal Property and Administrative Services Act of 1949;

(2) monitoring the effectiveness of, and compliance with, directives issued pursuant to sections 110 and 111 of such Act of 1949 and reviewing proposed determinations under section 111(g) of such Act;

(3) providing advice and guidance on the acquisition and use of automatic data processing and telecommunications equipment, and coordinating, through the review of budget proposals and other methods, agency proposals for acquisition and use of such equipment;

(4) promoting the use of automatic data processing and telecommunications equipment by the Federal Government to improve the effectiveness of the use and dissemination of data in the operation of Federal programs; and

(5) initiating and reviewing proposals for changes in legislation, regulations, and agency procedures to improve automatic data processing and telecommunications practices, and informing the President and the Congress of the progress made therein.

(h)(1) As soon as practicable, but no later than publication of a notice of proposed rulemaking in the Federal Register, each agency shall forward to the Director a copy of any proposed rule which contains a collection of information requirement and upon request, information necessary to make the determination required pursuant to this section.

(2) Within sixty days after the notice of proposed rulemaking is published in the Federal Register, the Director may file public comments pursuant to the standards set forth in section 3508 on the collection of information requirement contained in the proposed rule.

(3) When a final rule is published in the Federal Register, the agency shall explain how any collection of information requirement contained in the final rule responds to the comments, if any, filed by the Director or the public, or explain why it rejected those comments.

(4) The Director has no authority to disapprove any collection of information requirement specifically contained in an agency rule, if he has received notice and failed to comment on the rule within sixty days of the notice of proposed rulemaking.

(5) Nothing in this section prevents the Director, in his discretion—

(A) from disapproval any information collection request which was not specifically required by an agency rule;

(B) from disapproving any collection of information requirement contained in an agency rule, if the agency failed to comply with the requirements of paragraph (1) of this subsection:

(C) from disapproving any collection of information requirement contained in a final agency rule, if the Director finds within sixty days of the publication of the final rule that the agency's response to his comments filed pursuant to paragraph (2) of this subsection was unreasonable; or

(D) from disapproving any collection of information requirement where the Director determines that the agency has substantially modified in the final rule the collection of information requirement contained in the proposed rule where the agency has not given the Director the information required in paragraph (1), with respect to the modified collection of information requirement, at least sixty days before the issuance of the final rule.

(6) The Director shall make publicly available any decision to disapprove a collection of information requirement contained in an agency rule, together with the reasons for such decision.

(7) The authority of the Director under this subsection is subject to the provisions of section 3507(c).

(8) This subsection shall apply only when an agency publishes a notice of proposed rulemaking and requests public comments.

(9) There shall be no judicial review of any kind of the Director's decision to approve or not to act upon a collection of information requirement contained in an agency rule.

(Added Pub. L. 96–511, § 2(a), Dec. 11, 1980, 94 Stat. 2815; Pub. L. 98–497, title I, § 107(b)(26), Oct. 19, 1984, 98 Stat. 2291.)

§ 3505. Assignment of tasks and deadlines

In carrying out the functions under this chapter, the Director shall—

(1) upon enactment of this Act—

(A) set a goal to reduce the then existing burden of Federal collections of information by 15 per centum by October 1, 1982; and

(B) for the year following, set a goal to reduce the burden which existed upon enactment by an additional 10 per centum:

(2) within one year after the effective date of this Act—

(A) establish standards and requirements for agency audits of all major information systems and assign responsibility for conducting Government-wide or multiagency audits, except the Director shall not assign such responsibility for the audit of major information systems used for the conduct of criminal investigations or intelligence activities as defined in section 4-206 of Executive Order 12036, issued January 24, 1978, or successor orders, or for cryptologic activities that are communications security activities;

(B) establish the Federal Information Locator System;

(C) identify areas of duplication in information collection requests and develop a schedule and methods for eliminating duplication;

(D) develop a proposal to augment the Federal Information Locator System to include data profiles of major information holdings of agencies (used in the conduct of their operations) which are not otherwise required by this chapter to be included in the System; and

(E) identify initiatives which may achieve a 10 per centum reduction in the burden of Federal collections of information associated with the administration of Federal grant programs; and

(3) within two years after the effective date of this Act—

(A) establish a schedule and a management control system to ensure that practices and programs of information handling disciplines, including records management, are appropriately integrated with the information policies mandated by this chapter;

(B) identify initiatives to improve productivity in Federal operations using information processing technology;

(C) develop a program to (i) enforce Federal information processing standards, particularly software language standards, at all Federal installations; and (ii) revitalize the standards development program established pursuant to section 759(f)(2) of title 40, United States Code, separating it from peripheral technical assistance functions and directing it to the most productive areas;

(D) complete action on recommendations of the Commission on Federal Paperwork by implementing, implementing with modification or rejecting such recommendations including, where necessary, development of legislation to implement such recommendations;

(E) develop, in consultation with the Administrator of General Services, a five-year plan for meeting the automatic data processing and telecommunications needs of the Federal Government in accordance with the requirements of section 111 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 759) and the purposes of this chapter; and

(F) submit to the President and the Congress legislative proposals to remove inconsistencies in laws and practices involving privacy, confidentiality, and disclosure of information.

(Added Pub. L. 96–511, § 2(a), Dec. 11, 1980, 94 Stat. 2818.)

§ 3506. Federal agency responsibilities

(a) Each agency shall be responsible for carrying out its information management activities in an efficient, effective, and economical manner, and for complying with the information policies, principles, standards, and guidelines prescribed by the Director.

(b) The head of each agency shall designate, within three months after the effective date of this Act, a senior official or, in the case of military departments, and the Office of the Secretary of Defense, officials who report directly to such agency head to carry out the responsibilities of the agency under this chapter. If more than one official is appointed for the military departments the respective duties of the officials shall be clearly delineated.

(c) Each agency shall—

(1) systematically inventory its major information systems and periodically review its information management activities, including planning, budgeting, organizing, directing, training, promoting, controlling, and other managerial activities involving the collection, use, and dissemination of information.

(2) ensure its information systems do not overlap each other or duplicate the systems of other agencies;

(3) develop procedures for assessing the paperwork and reporting burden of proposed legislation affecting such agency;

(4) assign to the official designated under subsection (b) the responsibility for the conduct of and accountability for any acquisitions made pursuant to a delegation of authority under section 111 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 759); and

(5) ensure that information collection requests required by law or to obtain a benefit, and submitted to nine or fewer persons, contain a statement to inform the person receiving the request that the request is not subject to the requirements of section 3507 of this chapter.

(d) The head of each agency shall establish such procedures as necessary to ensure the compliance of the agency with the requirements of the Federal Information Locator System, including necessary screening and compliance activities.

(Added Pub. L. 96–511, § 2(a), Dec. 11, 1980, 94 Stat. 2819.)

§ 3507. Public information collection activities—submission to Director; approval and delegation

(a) An agency shall not conduct or sponsor the collection of information unless, in advance of the adoption or revision of the request for collection of such information—

(1) the agency has taken actions, including consultation with the Director, to—

(A) eliminate, through the use of the Federal Information Locator System and other means, information collections which seek to obtain information available from another source within the Federal Government;

(B) reduce to the extent practicable and appropriate the burden on persons who will provide information to the agency; and

(C) formulate plans for tabulating the information in a manner which will enhance its usefulness to other agencies and to the public;

(2) the agency (A) has submitted to the Director the proposed information collection request, copies of pertinent regulations and other related materials as the Director may specify, and an explanation of actions taken to carry out paragraph (1) of this subsection, and (B) has prepared a notice to be published in the Federal Register stating that the agency has made such submission; and

(3) the Director has approved the proposed information collection request, or the period for review of information collection requests by the Director provided under subsection (b) has elapsed.

(b) The Director shall, within sixty days of receipt of a proposed information collection request, notify the agency involved of the decision to approve or disapprove the request and shall make such decisions publicly available. If the Director determines that a request submitted for review cannot be reviewed within sixty days, the Director may, after notice to the agency involved, extend the review period for an additional thirty days. If the Director does not notify the agency of an extension, denial, or approval within sixty days (or, if the Director has extended the review period for an additional thirty days and does not notify the agency of a denial or approval within the time of the extension), a control number shall be assigned without further delay, the approval may be inferred, and the agency may collect the information for not more than one year.

(c) Any disapproval by the Director, in whole or in part, of a proposed information collection request of an independent regulatory agency, or an exercise of authority under section 3504(h) or 3509 concerning such an agency, may be voided, if the agency by a majority vote of its members overrides the Director's disapproval or exercise of authority. The agency shall certify each override to the Director, shall explain the reasons for exercising the override authority. Where the override concerns an information collection request, the Director shall without further delay assign a control number to such request, and such override shall be valid for a period of three years.

(d) The Director may not approve an information collection request for a period in excess of three years.

(e) If the Director finds that a senior official of an agency designated pursuant to section 3506(b) is sufficiently independent of program responsibility to evaluate fairly whether proposed information collection requests should be approved and has sufficient resources to carry out this responsibility effectively, the Director may, by rule in accordance with the notice and comment provisions of chapter 5 of title 5, United States Code, delegate to such official the authority to approve proposed requests in specific program areas, for specific purposes, or for all agency purposes. A delegation by the Director under this section shall not preclude the Director from reviewing individual information collection requests if the Director determines that circumstances warrant such a review. The Director shall retain authority to revoke such delegations, both in general and with regard to any specific matter. In acting for the Director, any official to whom approval authority has been delegated under this section shall comply fully with the rules and regulations promulgated by the Director.

(f) An agency shall not engage in a collection of information without obtaining from the Director a control number to be displayed upon the information collection request.

(g) If an agency head determines a collection of information (1) is needed prior to the expiration of the sixty-day period for the review of information collection requests established pursuant to subsection (b), (2) is essential to the mission of the agency, and (3) the agency cannot reasonably comply with the provisions of this chapter within such sixty-day period because (A) public harm will result if normal clearance procedures are followed, or (B) an unanticipated event has occurred and the use of normal clearance procedures will prevent or disrupt the collection of information related to the event or will cause a statutory deadline to be missed, the agency head may request the Director to authorize such collection of information prior to expiration of such sixty-day period. The Director shall approve or disapprove any such authorization request within the time requested by the agency head and, if approved, shall assign the information collection request a control number. Any collection of information conducted pursuant to this subsection may be conducted without compliance with the provisions of this chapter for a maximum of ninety days after the date on which the Director received the request to authorize such collection.

(Added Pub. L. 96–511, § 2(a), Dec. 11, 1980, 94 Stat. 2819.)

§ 3508. Determination of necessity for information; hearing

Before approving a proposed information collection request, the Director shall determine whether the collection of information by an agency is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility. Before making a determination the Director may give the agency and other interested persons an opportunity to be heard or to submit statements in writing. To the extent, if any, that the Director determines that the collection of information by an agency is unnecessary, for any reason, the agency may not engage in the collection of the information.

(Added Pub. L. 96–511, § 2(a), Dec. 11, 1980, 94 Stat. 2821.)

§ 3509. Designation of central collection agency

The Director may designate a central collection agency to obtain information for two or more agencies if the Director determines that the needs of such agencies for information will be adequately served by a single collection agency, and such sharing of data is not inconsistent with any applicable law. In such cases the Director shall prescribe (with reference to the collection of information) the duties and functions of the collection agency so designated and of the agencies for which it is to act as agent (including reimbursement for costs). While the designation is in effect, an agency covered by it may not obtain for itself information which it is the duty of the collection agency to obtain. The Director may modify the designation from time to time as circumstances require. The authority herein is subject to the provisions of section 3507(c) of this chapter.

(Added Pub. L. 96-511, § 2(a), Dec. 11, 1980, 94 Stat. 2821.)

§ 3510. Cooperation of agencies in making information available

(a) The Director may direct an agency to make available to another agency, or an agency may make available to another agency, information obtained pursuant to an information collection request if the disclosure is not inconsistent with any applicable law.

(b) If information obtained by an agency is released by that agency to another agency, all the provisions of law (including penalties which relate to the unlawful disclosure of information) apply to the officers and employees of the agency to which information is released to the same extent and in the same manner as the provisions apply to the officers and employees of the agency which originally obtained the information. The officers and employees of the agency to which the information is released, in addition, shall be subject to the same provisions of law, including penalties, relating to the unlawful disclosure of information as if the information had been collected directly by that agency.

(Added Pub. L. 96-511, § 2(a), Dec. 11, 1980, 94 Stat. 2822.)

§ 3511. Establishment and operation of Federal Information Locator System

(a) There is established in the Office of Information and Regulatory Affairs a Federal Information Locator System (hereafter in this section referred to as the "System") which shall be composed of a directory of information resources, a data element dictionary, and an information referral service. The System shall serve as the authoritative register of all information collection requests.

(b) In designing and operating the System, the Director shall—

(1) design and operate an indexing system for the System;

(2) require the head of each agency to prepare in a form specified by the Director, and to submit to the Director for inclusion in the System, a data profile for each information collection request of such agency;

(3) compare data profiles for proposed information collection requests against existing profiles in the System, and make available the results of such comparison to—

(A) agency officials who are planning new information collection activities; and

(B) on request, members of the general public; and

(4) ensure that no actual data, except descriptive data profiles necessary to identify duplicative data or to locate information, are contained within the System.

(Added Pub. L. 96–511, § 2(a), Dec. 11, 1980, 94 Stat. 2822.)

§ 3512. Public protection

Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to maintain or provide information to any agency if the information collection request involved was made after December 31, 1981, and does not display a current control number assigned by the Director, or fails to state that such request is not subject to this chapter.
(Added Pub. L. 96–511, § 2(a), Dec. 11, 1980, 94 Stat. 2822.)

§ 3513. Director review of agency activities; reporting; agency response

(a) The Director shall, with the advice and assistance of the Administrator of General Services and the Archivist of the United States, selectively review, at least once every three years, the information management activities of each agency to ascertain their adequacy and efficiency. In evaluating the adequacy and efficiency of such activities, the Director shall pay particular attention to whether the agency has complied with section 3506.

(b) The Director shall report the results of the reviews to the appropriate agency head, the House Committee on Government Operations, the Senate Committee on Governmental Affairs, the House and Senate Committees on Appropriations, and the committees of the Congress having jurisdiction over legislation relating to the operations of the agency involved.

(c) Each agency which receives a report pursuant to subsection (b) shall, within sixty days after receipt of such report, prepare and transmit to the Director, the House Committee on Government Operations, the Senate Committee on Governmental Affairs, the House and Senate Committees on Appropriations, and the committees of the Congress having jurisdiction over legislation relating to the operations of the agency, a written statement responding to the Director's report, including a description of any measures taken to alleviate or remove any problems or deficiencies identified in such report.
(Added Pub. L. 96–511, § 2(a), Dec. 11, 1980, 94 Stat. 2822; Pub. L. 98–497, title I, § 107(b)(27), Oct. 19, 1984, 98 Stat. 2291.)

* * * * *

§ 3515. Administrative powers

Upon the request of the Director, each agency (other than an independent regulatory agency), shall, to the extent practicable, make its services, personnel, and facilities available to the Director for the performance of functions under this chapter.
(Added Pub. L. 96–511, § 2(a), Dec. 11, 1980, 94 Stat. 2824.)

§ 3516. Rules and regulations

The Director shall promulgate rules, regulations, or procedures necessary to exercise the authority provided by this chapter.

(Added Pub. L. 96–511, § 2(a), Dec. 11, 1980, 94 Stat. 2824.)

§ 3517. Consultation with other agencies and the public

In development of information policies, plans, rules, regulations, procedures, and guidelines and in reviewing information collection requests, the Director shall provide interested agencies and persons early and meaningful opportunity to comment.

(Added Pub. L. 96–511, § 2(a), Dec. 11, 1980, 94 Stat. 2824.)

§ 3518. Effect on existing laws and regulations

(a) Except as otherwise provided in this chapter, the authority of an agency under any other law to prescribe policies, rules, regulations, and procedures for Federal information activities is subject to the authority conferred on the Director by this chapter.

(b) Nothing in this chapter shall be deemed to affect or reduce the authority of the Secretary of Commerce or the Director of the Office of Management and Budget pursuant to Reorganization Plan No. 1 of 1977 (as amended) and Executive order, relating to telecommunications and information policy, procurement and management of telecommunications and information systems, spectrum use, and related matters.

(c)(1) Except as provided in paragraph (2), this chapter does not apply to the collection of information—

(A) during the conduct of a Federal criminal investigation or prosecution, or during the disposition of a particular criminal matter,

(B) during the conduct of (i) a civil action to which the United States or any official or agency thereof is a party or (ii) an administrative action or investigation involving an agency against specific individuals or entities;

(C) by compulsory process pursuant to the Antitrust Civil Process Act and section 13 of the Federal Trade Commission Improvements Act of 1980; or

(D) during the conduct of intelligence activities as defined in section 4–206 of Executive Order 12036, issued January 24, 1978, or successor orders, or during the conduct of cryptologic activities that are communications security activities.

(2) This chapter applies to the collection of information during the conduct of general investigations (other than information collected in an antitrust investigation to the extent provided in subparagraph (C) of paragraph (1)) undertaken with reference to a category of individuals or entities such as a class of licensees or an entire industry.

(d) Nothing in this chapter shall be interpreted as increasing or decreasing the authority conferred by Public Law 89–306 on the Administrator of the General Services Administration, the Secretary of Commerce, or the Director of the Office of Management and Budget.

(e) Nothing in this chapter shall be interpreted as increasing or decreasing the authority of the President, the Office of Management and Budget or the Director thereof, under the laws of the United States, with respect to the substantive policies and programs of departments, agencies and offices, including the substantive authority of any Federal agency to enforce the civil rights law.

(Added Pub. L. 96-511, § 2(a), Dec. 11, 1980, 94 Stat. 2824.)

TITLE 50, U.S. CODE—APPENDIX

* * * * *

SURPLUS PROPERTY ACT OF 1944

§ 1622. Disposal to local governments and nonprofit institutions

(d) Power transmission lines

Whenever any State or political subdivision thereof, or any State or Government agency or instrumentality certifies to the Administrator of General Services that any power transmission line determined to be surplus property under the provisions of this Act [sections 1611 to 1646 of this Appendix] is needful for or adaptable to the requirements of any public or cooperative power project, such line and the right-of-way acquired for its construction shall not be sold, leased for more than one year, or otherwise disposed of, except as provided in section 12 [section 1621 of this Appendix] or this section, unless specifically authorized by Act of Congress.

(Act of October 3, 1944, ch. 479, § 13, 58 Stat. 770.)

EXPLANATORY NOTE

Cross Reference. For later general provisions dealing with the disposition of surplus property see the extracts from the Federal Property and Administrative Services Act of 1949 which appear in Volume II at page 958.

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